No. 15-1256

Title:	Shannon Nelson, Petitioner v. Colorado
Docketed:	April 8, 2016
Lower Ct:	Supreme Court of Colorado
Case Nos.:	(13SC495)
Decision Date:	December 21, 2015
Rehearing Denied:	February 8, 2016 Rule 12.4

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 6 2016	Petition for a writ of certiorari filed. (Response due May 9, 2016)
Apr 19 2016	Waiver of right of respondent Colorado to respond filed.
May 3 2016	DISTRIBUTED for Conference of May 19, 2016.
May 11 2016	Response Requested. (Due June 10, 2016)
May 20 2016	Order extending time to file response to petition to and including August 9, 2016.
Jun 10 2016	Brief amicus curiae of Colorado Criminal Defense Bar filed.
Aug 9 2016	Brief of respondent Colorado in opposition filed.
Aug 18 2016	Reply of petitioners Shannon Nelson and Louis Alonzo Madden filed.
Aug 24 2016	DISTRIBUTED for Conference of September 26, 2016.
Sep 29 2016	Petition GRANTED.
Nov 14 2016	Joint appendix filed. (Statement of costs filed)
Nov 14 2016	Brief of petitioners Shannon Nelson and Louis Alonzo Madden filed.
Nov 17 2016	Brief amicus curiae of Pacific Legal Foundation filed.
Nov 18 2016	Brief amici curiae of Institute for Justice and the Cato Institute filed.
Nov 21 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 5 2016	SET FOR ARGUMENT on Monday, January 9, 2017.
Dec 7 2016	Record requested from the Supreme Court of Colorado.
Dec 12 2016	CIRCULATED.
Dec 13 2016	Record received from the Supreme Court of Colorado in Case 13SC495. 1 Box (part of the record is SEALED).
Dec 14 2016	Brief of respondent Colorado filed. (Distributed)
Dec 22 2016	Reply of petitioners Shannon Nelson and Louis Alonzo Madden filed. (Distributed)
Jan 5 2017	Record received from the Supreme Court of Colorado in Case 13SC496. 1 Box (part of the record is SEALED).
Jan 9 2017	Argued. For petitioners: Stuart Banner, Los Angeles, Cal. For respondent: Frederick R. Yarger, Solicitor General, Denver, Colo.
Mar 28 2017	Letter dated March 24, 2017, from counsel for the respondent informing the Court of recently enacted legislation received. (Distributed)

Apr 19 2017	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Thomas, J., filed a dissenting opinion. Gorsuch, J., took no part in the consideration or decision of the cases.
May 22 2017	JUDGMENT ISSUED.
May 22 2017	MANDATE ISSUED.

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RECORD AND BRIEFS

15-1256

No. 15-

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence to get their money back.

The Question Presented is whether this requirement is consistent with due process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shannon Nelson and Louis Alonzo Madden respectfully petition for a writ of certiorari to review the judgments of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court in *People v. Nelson* is reported at 362 P.3d 1070 (Colo. 2016). App 1a. The opinion of the Colorado Supreme Court in *People v. Madden* is reported at 364 P.3d 866 (Colo. 2016). App. 36a. The opinion of the Colorado Court of Appeals in *People v. Nelson* has not been published but is available at 2013 WL 1760903 (Colo. Ct. App. 2013). App. 50a. The opinion of the Colorado Court of Appeals in *People v. Madden* has not been published but is available at 2013 WL 1760869 (Colo. Ct. App. 2013). App. 64a.

JURISDICTION

The judgments of the Colorado Supreme Court were entered on December 21, 2015. The Colorado Supreme Court denied timely petitions for rehearing on February 8, 2016. App. 77a, 78a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Like many states, Colorado requires people convicted of crimes to pay various monetary penalties, including court costs, fees, and restitution. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Colorado keeps the money. The only way a person can get his or her money back is to prove, by clear and convincing evidence, that he or she is actually innocent of the charged offense.

Colorado's scheme is inconsistent with due process.

1. This certiorari petition consolidates two cases raising the same issue that were decided on the same day by the Colorado Supreme Court.

a. Petitioner Shannon Nelson was convicted in 2006 of five sexual assault offenses she allegedly committed against her children. App. 1a. In addition to a prison term, Nelson's sentence included several monetary charges that state law imposes only on defendants who are convicted. These were: (1) a $125 fee designated for Colorado's Crime Victim Compensation Fund;[1] (2) a $162.50 "surcharge" designated for Colorado's Victims and Witnesses Assistance and Law Enforcement Fund;[2] (3) a "docket fee" of $35;[3]

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[1] *See* Colo. Rev. Stat. § 24-4.1-119(1)(a). The statute currently sets the fee at $163, but it was $125 when Nelson was convicted.

[2] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(I). The statute currently sets the surcharge at $163, but it was $162.50 when Nelson was convicted.

(4) a "time payment fee" of $25;[4] and (5) restitution amounting to $7,845, for a total of $8,192.50. App. 2a.

Nelson's convictions were reversed on appeal. App. 2a. On retrial, she was acquitted of all charges. App. 2a. The Colorado Department of Corrections had already taken $702.10 from her inmate account in partial payment of the amount she no longer owed to the state—$125 for the Crime Victim Compensation Fund, $162.50 for the Victims and Witnesses Assistance and Law Enforcement Fund, and $414.60 for restitution. App. 2a n.1.

Soon after her acquittal, Nelson filed a motion seeking the refund of this money. App. 2a. She argued that the failure to return the money would constitute a denial of due process under the federal Constitution. App. 2a. The trial court concluded that it lacked the authority to order the state to refund the $702.10 it had taken from Nelson. App. 70a-73a.

b. Petitioner Louis Alonzo Madden was convicted in 2005 of attempting to patronize a prostituted child and attempted sexual assault. App. 37a. In addition to a prison term, Madden's sentence included: (1) the $125 fee designated for Colorado's Crime Victim Compensation Fund; (2) a $125 surcharge designated for the Victims and Witnesses Assistance and Law Enforcement Fund; (3) a $30 docket fee; (4) the $25 time payment fee; (5) a $2,000 "sex offender surcharge";[5] (6) a $128 fee for genetic testing of sex of-

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[3] *See* Colo. Rev. Stat. § 13-32-105(1).

[4] *See* Colo. Rev. Stat. § 16-11-101.6(1).

[5] *See* Colo. Rev. Stat. § 18-21-103(1).

fenders;[6] (7) a $1,000 "special advocate surcharge";[7] (8) a $45 fee for a "substance abuse assessment";[8] (9) a $25 fee for drug testing; and (10) $910 in restitution, for a total of $4,413. App. 37a.

On direct appeal, Madden's conviction for attempted patronizing was reversed, leaving only his conviction for attempted assault. App. 37a. That conviction was vacated on state collateral review. App. 37a-38a. The prosecutor chose not to retry the case. App. 38a. Madden had already paid the state $1,220 in fees and $757.75 in restitution he no longer owed, for a total of $1,977.75. App. 38a.

Madden moved for a refund of these payments. He alleged that the failure to return the money would constitute a denial of due process under the Fourteenth Amendment. App. 75a. The trial court granted Madden's motion with respect to the $1,220 in fees, but denied the motion with respect to the $757.75 in restitution. App. 76a.

2. The Colorado Court of Appeals reversed in both cases. App. 50a, 64a. The Court of Appeals determined that state law required refunding all the money that Nelson and Madden had paid.

In Nelson's case, the Court of Appeals reasoned that both fees and restitution "must be tied to a valid conviction." App. 53a. Because Nelson's convictions

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[6] *See* Colo. Rev. Stat. § 16-11-102.4.

[7] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(II)(A). The statute currently sets this surcharge at $1,300, but it was $1,000 when Madden was convicted.

[8] *See* Colo. Rev. Stat. § 18-1.3-209.

had been overturned, the court concluded, she was entitled to recover the amounts she had paid. App. 54a-57a. The Court of Appeals further concluded that Nelson could seek a refund in her pending criminal case without having to file a separate civil action. App. 57a-62a. The Court of Appeals noted that because it had ruled in Nelson's favor based on state law, it had no need to address her federal constitutional arguments. App. 62a.

The same panel of the Court of Appeals decided Madden's case on the same day. App. 64a. In a shorter opinion, the court applied the principles it had just elucidated in Nelson's case to conclude that Madden was also entitled to a refund of the amounts he had paid, and that he did not have to file a separate civil action. App. 65a-69a.

3. The Colorado Supreme Court reversed in both cases. App. 1a, 36a.

a. In Nelson's case, the court held that under state law, Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to -103, provides the exclusive remedy for people who seek refunds of fees and restitution when their convictions are reversed. App. 14a-20a. The court explained that the judiciary could authorize refunds from public funds only pursuant to statutory authority, App. 17a, and that the Exoneration Act is the only statute addressing the circumstances under which courts may authorize such refunds, App. 19a. Under the Exoneration Act, the court observed, an exonerated person is entitled to a refund of fines, penalties, and restitution, along with other compensation, if she can "prove, by clear and con-

vincing evidence, that she was 'actually innocent.'" App. 12a (quoting Colo. Rev. Stat. §§ 13-65-101(1)(a) and 13-65-102(1)(a)). Because Nelson had not filed suit under the Exoneration Act, the court concluded that the trial court lacked the authority to order a refund. App. 20a.

The Colorado Supreme Court then turned to Nelson's contention that due process requires a refund. App. 20a. The court rejected this contention as well. "We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted," the court concluded. App. 20a. "The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." App. 20a.[9]

The Colorado Supreme Court acknowledged that the Due Process Clause of the Fourteenth Amendment "requires, at a minimum, notice and the opportunity for a meaningful hearing before an impartial

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[9] Briefing in the Colorado Supreme Court focused entirely on state law, because the state was attacking, and Nelson and Madden were defending, Court of Appeals judgments that rested on state law. This Court nevertheless has jurisdiction to consider the Fourteenth Amendment due process issue that was raised by Nelson and Madden in the trial court, because the Colorado Supreme Court explicitly decided this issue, and indeed considered it at length. *See, e.g., Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (referring to "the 'elementary rule that it is irrelevant to inquire ... when a Federal question was raised in a court below when it appears that such question was actually considered and decided'" (quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914)).

tribunal." App. 21a (citations and internal quotation marks omitted). The court determined, however, that "due process does not require an automatic refund of fines paid in connection with a conviction" when that conviction has been reversed. App. 22a. The court concluded that the Exoneration Act "provides sufficient process for defendants to seek a refund of costs, fees, and restitution that they incurred while a conviction was in place." App. 22a.

Justice Hood dissented. App. 22a. He began by observing that "[b]ecause Nelson was never validly convicted, we presume she is innocent." App. 24a. Therefore, "just as the State was required to release Nelson from incarceration, it should also be required to release Nelson's money paid as costs, fees, and restitution." App. 25a. "I struggle," he explained, "to see how we can sanction a system that makes money immediately due without providing for its return when reversible error occurs." App. 25a.

Justice Hood concluded that the Exoneration Act is not an adequate remedy to comply with the requirements of due process. App. 28a. First, he explained, "requiring defendants who have never been validly convicted to resort to this Act flips the presumption of innocence. The Act establishes a separate civil claim that puts the burden on the petitioner to demonstrate her actual innocence by clear and convincing evidence." App. 28a.

Second, Justice Hood noted that "the Act is not geared toward refunds." App. 28a. He observed that the Exoneration Act provides, not just refunds, "but also $70,000 for every year of wrongful incarcera-

tion." App. 28a. "But Nelson is not seeking such broad relief; she is merely asking for a return to the status quo ante." App. 29a.

Third, Justice Hood explained that "the majority ignores the impracticability of bringing a separate civil action." App. 29a. Because defendants are not entitled to state-appointed counsel to bring claims under the Exoneration Act, "they must retain a lawyer or find one willing to work for free," both of which are unlikely prospects considering "the relatively low amounts available" when defendants merely seek the return of fees. App. 29a.

Finally, Justice Hood pointed out that the Exoneration Act provides no recourse whatsoever for defendants who have had money withheld due to misdemeanor convictions that have been reversed, because the Act only grants relief to people convicted of felonies. App. 29a n.1.

For these reasons, Justice Hood "respectfully disagree[d] with the majority's determination that the Exoneration Act provides 'sufficient process'" to comply with the requirements of the Due Process Clause. App. 29a.

b. The Colorado Supreme Court decided Madden's case on the same day. App. 36a. In a shorter opinion, the court applied the principles it had just expounded in Nelson's case. The court again explained that under state law the Exoneration Act is the exclusive means of obtaining a refund of fees and restitution when a conviction is vacated, and that because Madden had not filed suit under the Exoneration Act, the

trial court lacked the authority to grant a refund. App. 44a-45a.

Justice Hood again dissented. App. 45a.

The Colorado Supreme Court denied rehearing in both cases. App. 77a, 78a.

REASONS FOR GRANTING THE WRIT

Colorado appears to be the only state that requires defendants to prove their innocence before they can get a refund of monetary penalties when a conviction is reversed. It is hardly surprising that Colorado stands alone, because Colorado's scheme is so clearly contrary to due process.

I. Colorado violates the Due Process Clause by requiring defendants to prove their innocence by clear and convincing evidence to get a refund of monetary penalties when a conviction is reversed.

Colorado's scheme is inconsistent with due process, viewed from any angle. First, Colorado's scheme flouts due process by placing the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. Second, Colorado's scheme is contrary to the Court's repeated admonition that the Due Process Clause requires states to provide a clear and certain remedy to recover money the state has wrongfully withheld. Third, Colorado's scheme cannot be squared with the fundamental principles governing procedural due process. Finally, Colorado's scheme is contrary to traditional practice in both and civil and criminal cases, under which,

when a judgment is reversed, courts have always ordered the refund of money paid to satisfy the judgment.

A. Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties.

The most basic requirement of due process in criminal cases is that in order to impose a criminal penalty, the state must prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). The state may not shift its burden of proof to the defendant. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). In a criminal case, the Due Process Clause ensures that "a defendant has no obligation to prove his innocence." *District Attorney's Office v. Osborne*, 557 U.S. 52, 87 n.5 (2009) (Alito, J., concurring).

Colorado, by contrast, requires a defendant to prove her innocence. The state has taken $702.10 from Nelson and $1,977.75 from Madden, but neither stands convicted of any crime. To avoid these penalties, Nelson and Madden should not have to prove anything. The Due Process Clause places the burden of proof on Colorado if it wishes to keep their money, not on Nelson and Madden to get it back.

Indeed, Colorado defendants must not only prove their innocence, but they must prove it by clear and convincing evidence, which the Court has repeatedly

recognized as "a heavy burden." *Microsoft Corp. v. i4i Limited Partnership*, 131 S. Ct. 2238, 2246 (2011); *Cooper v. Oklahoma*, 517 U.S. 348, 361 (1996). The state may require defendants to satisfy this burden in order to recover in tort for having been wrongfully incarcerated (which is what the Exoneration Act is primarily intended to do). But the Due Process Clause bars the state from imposing this heavy burden on defendants who do not seek to recover in tort at all, but simply want a refund of monetary penalties when their convictions have been reversed.

B. Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld.

Where a state has collected a tax that is subsequently determined to have been unlawful, "due process requires a 'clear and certain' remedy" for obtaining a refund. *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)). As the Court has repeatedly admonished, "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 22 (1990). *See also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930); *Ward v. Love Cty. Board of Comm'rs*, 253 U.S. 17, 24 (1920).

This principle applies equally to monetary penalties collected by a state pursuant to a conviction that

is subsequently reversed. Just as a state cannot collect a tax and then, when the tax is found unlawful, refuse to provide a meaningful procedure for taxpayers to secure refunds, a state cannot impose monetary penalties for criminal convictions and then, when the convictions are reversed, refuse to provide a meaningful procedure for defendants to secure refunds. In both instances, the state is keeping property that belongs to its citizens. In both instances, the failure to provide a meaningful procedure is quite literally a deprivation of property without due process.

Colorado's Exoneration Act is not a "clear and certain" remedy for defendants to obtain refunds of monetary penalties the state is wrongfully withholding. It imposes a burden on defendants that is utterly irrelevant to the relief the defendants seek. The state collects fees and restitution from people who have been *convicted*, not from people who are factually guilty but have not been convicted. A defendant whose conviction has been reversed is entitled to a refund simply upon showing that her conviction has been reversed. Whether she can also prove that she is factually innocent, much less prove her innocence by clear and convincing evidence, is beside the point. Again, while the state may place obstacles in the path of defendants who seek to recover in tort for their wrongful incarceration, it may not place such obstacles in the path of those who merely want their money back when their convictions have been reversed.

Moreover, as a practical matter, Colorado's Exoneration Act is a complete barrier to defendants who merely seek a refund, because the sums involved are typically too small to justify the expense of a full-blown civil trial. Shannon Nelson is seeking the return of $702.10. Louis Madden is seeking the return of $1,977.75. No rational person would file suit under the Exoneration Act to recover such small amounts, and no rational lawyer would take such a case. The only plaintiffs who can realistically be expected to file suit under the Act are people seeking tort damages for wrongful incarceration, who are entitled to $70,000 per year of incarceration, plus another $50,000 per year if they were under a death sentence. Colo. Rev. Stat. § 13-65-103(3)(a). The Exoneration Act is an illusory remedy for people like Nelson and Madden, who just want a refund of small monetary penalties.[10]

To make matters worse, Colorado's Exoneration Act is not even available to many defendants. To recover under the Exoneration Act, a defendant must have been "convicted of a felony," the defendant must have been "sentenced to a term of incarceration," and the defendant must have "served all or part of such sentence." Colo. Rev. Stat. § 13-65-102(1)(a). Defendants who do not satisfy these requirements—including defendants who paid mone-

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[10] Although the Exoneration Act provides "[r]easonable attorney fees for bringing a claim under this section," Colo. Rev. Stat. § 13-65-103(2)(e)(IV), the Colorado courts have not yet had any opportunity to consider what would be a reasonable fee for bringing a suit to recover such small amounts, perhaps because no lawyer has been foolhardy enough to file one.

tary penalties pursuant to misdemeanor convictions, defendants who paid monetary penalties pursuant to felony convictions that did not involve a prison sentence, and defendants who paid monetary penalties pursuant to felony convictions and who were out on bail pending appeal—are ineligible to recover under the Exoneration Act. For these defendants, the Exoneration Act is not just an illusory remedy; it is no remedy at all.

C. Colorado's scheme is contrary to fundamental principles governing procedural due process.

In determining whether a procedure complies with the Due Process Clause, the Court has often undertaken "[t]he three-part inquiry set forth in *Matthews v. Eldridge*," which requires consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used ... ; and the Government's interest." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, all three factors indicate that Colorado's scheme is inconsistent with due process.

First, there is no doubt that people whose convictions have been reversed have a property interest in obtaining a refund of monetary penalties. It is their money, not Colorado's.

Second, Colorado's scheme poses an extraordinarily high risk of erroneously depriving such people of their property. Many defendants whose convictions

have been reversed are unable to prove their innocence by clear and convincing evidence. Most grounds for reversal involve legal errors that took place at trial. In such cases, reversal does not establish the defendant's innocence. Even a defendant who is subsequently acquitted, as Shannon Nelson was, is likely to be unable to prove her innocence by clear and convincing evidence. Nelson can show that she is not guilty beyond a reasonable doubt, but it is a far heavier burden for her to show by clear and convincing evidence that she is innocent. Indeed, the Exoneration Act specifies that a "court may not reach a finding of actual innocence pursuant to this section merely ... [b]ecause the court finds the evidence legally insufficient to support the petitioner's conviction." Colo. Rev. Stat. § 13-65-101(1)(b)(1).

Third, the government's interest is non-existent. Colorado has no legitimate reason to keep money that rightly belongs to people whose convictions have been reversed. It is not Colorado's money. What the state is doing is far more egregious than the asset freezes the Court recently found unconstitutional in *Luis v. United States*, No. 14-419 (Mar. 30, 2016). There, the government at least had good reason to expect that the money it sought to restrain would one day be forfeitable by virtue of a criminal conviction. Here, by contrast, the criminal proceedings have already terminated in the defendants' favor, and there is no chance that either defendant will be re-prosecuted. This money will never belong to Colorado.

Colorado's scheme flunks the three-part test of *Matthews v. Eldridge*. It serves no purpose other than allowing the state to keep property that belongs to its citizens.

D. Colorado's scheme is contrary to traditional practice, under which the reversal of a judgment has always required the refund of money paid pursuant to that judgment.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Where a state abrogates "settled usages and modes of proceeding," *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 277 (1855), and where "the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor Co.*, 512 U.S. at 430.

The traditional rule has always been that when a judgment is reversed, a person who paid money pursuant to that judgment is entitled to receive the money back. The Court has referred to this rule as "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919). As the Court explained, "[t]his right, so well founded in equity, has

been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution, and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error be restored to all things which he ha[d] lost by occasion of the said judgment." *Id.* (citation and internal quotation marks omitted).

This traditional rule is so commonsensical that one can find it stated over and over again, in cases and treatises alike. *See, e.g.*, *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution."); *Haebler v. Myers*, 30 N.E. 963, 964 (N.Y. 1892) ("Restitution was ... exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment but restored to the aggrieved party that which he had lost in consequence thereof."); *Restatement (First) of Restitution* § 74 ("A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside."); William A. Keener, *A Treatise on the Law of Quasi-Contracts* 417 (1893) ("a party who has paid money upon a judgment which has been subsequently reversed, may sue in a count for money had and received to recover the money so paid").

This is the traditional rule in criminal cases as well. Where the defendant paid a monetary penalty as a result of a conviction, and the conviction was subsequently reversed, the defendant has always been entitled to have his money refunded. *See, e.g.*, *United States v. Rothstein*, 187 F. 268, 269 (7th Cir. 1911) (after conviction reversed, agreeing with District Court that defendant "is of right entitled to the restitution of said $200 by him paid as a fine"); *Devlin v. United States*, 12 Ct. Cl. 266, 272-73 (1876) (after conviction reversed, court orders government to refund $10,000 fine); *New Jersey Society for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 117 (N.J. 1908) (after conviction reversed, court orders refund of $20 fine and $3.60 in costs); *Lucas v. Commonwealth*, 41 Pa. C.C. 673, 675 (Pa. Ct. of Comm. Pleas 1914) (after conviction reversed, court orders that "restitution of the fines and costs be made to the defendants"); *Merkee v. City of Rochester*, 13 Hun. 157, 162 (N.Y. Sup. 1878) (after conviction reversed, court orders "that the money which the plaintiff sued to recover was paid under the duress of a void judgment and could be recovered back"); *People ex rel. McMahon v. Board of Auditors*, 49 N.W. 921 (Mich. 1879) (unpublished opinion; headnote reads "Where a judgment imposing a fine is reversed after a defendant has paid the fine to avoid imprisonment, *mandamus* will lie to the board of auditors to refund the fine.").

Colorado followed this traditional practice until recently. *See, e.g.*, *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing conviction, ordering that "the parties be placed in *status quo* by refund to

the defendant of the sums paid as fine and costs"); *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1991) ("'a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of reversal, to be restored by his adversary to that which he has lost thereby'") (quoting *Arkadelphia Milling*, 249 U.S. at 145); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo. Ct. App. 1993) ("a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution").

Now, however, the Colorado Supreme Court has abrogated this traditional rule by construing the Exoneration Act, which was enacted in 2013, as the exclusive remedy for obtaining a refund of monetary penalties when a conviction is reversed. Colorado has replaced a fair and sensible procedure with one that virtually ensures that defendants will not get their money back. No matter how one looks at Colorado's scheme, it is flagrantly inconsistent with due process.

II. Colorado appears to be the only state that does not refund monetary penalties when a conviction is reversed.

There appears to be no other jurisdiction with a scheme like Colorado's. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed. They do not have to prove anything.

Several states mandate this result by statute. *See, e.g.*, N.Y. Penal Law § 60.35(4) ("Any person who has

paid a mandatory surcharge, sex offender registration fee, DNA databank fee, a crime victim assistance fee or a supplemental sex offender victim fee under the authority of this section based upon a conviction that is subsequently reversed ... shall be entitled to a refund."); Miss. Code § 99-19-73(12) ("The State Auditor shall establish by regulation procedures for ... refunds after appeals in which the defendant's conviction is reversed."); Cal. Penal Code § 1262 ("If a judgment against the defendant is reversed and the case is dismissed, or if the appellate court directs a final disposition of the action in defendant's favor, and defendant has theretofore paid a fine in the case, such act shall also be deemed an order of the court that the fine, including any penalty assessment thereon, be returned to defendant."); Del. Code tit. 11, § 4103(a) ("The State Treasurer shall remit to each person, or to the attorney of such person, who has paid a fine upon a conviction which was later set aside by a court of higher jurisdiction."); Tex. Code Crim. Proc. art. 103.008(a) ("On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending shall correct any error in the costs.").

In other jurisdictions, courts routinely refund monetary penalties when convictions are reversed. *See, e.g., Telink, Inc. v. United States*, 24 F.3d 42, 47 (9th Cir. 1994) ("If Telink and Burnup prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action and without regard to the limitations

period for civil actions."); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines. This it could do without requiring the bringing of another action."); *United States v. Beckner*, 16 F. Supp. 2d 677, 678-79 (M.D. La. 1998) (holding that when a conviction is reversed, federal courts have authority under the All Writs Act, 28 U.S.C. § 1651, to order the refund of restitution collected from the defendant and disbursed to victims); *United States v. Venneri*, 782 F. Supp. 1091, 1094-95 (D. Md. 1991) (same); *People v. Meyerowitz*, 335 N.E.2d 1, 7 (Ill. 1975) ("We hold that the defendants are entitled to a refund of the fines and costs they have paid as a result of their void convictions."); *Bogard v. State*, 450 S.W.3d 690, 692 (Ark. Ct. App. 2014) (after conviction reversed, directing that "any restitution already paid by Bogard to Whitwell be refunded"); *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Ct. App. 1980) (after conviction reversed, court should refund fine, restitution, and fees "as part of its inherent power to correct the effects of its own wrongdoing and restore the petitioner to the *status quo ante*"); *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012) (after conviction reversed, court has authority "to order the return of restitution erroneously paid").

Several courts have held, contrary to the view taken by the Colorado Supreme Court, that due process requires that defendants receive a refund of monetary penalties when their convictions are re-

versed. The case often cited as providing the clearest discussion of this issue is *United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973), in which the court observed:

> While there are no means available to compensate a person who has been imprisoned for violating a statute that is subsequently found constitutionally void and retrospectively applied, there is always a means for such a person to recoup his losses when the loss takes the form of a monetary fine. *The Fifth Amendment prohibition against the taking of one's property without due process demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law.* Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of the prosecution.

Id. at 836 (emphasis added).

With the exception of the Colorado Supreme Court, every other court to have addressed this question has agreed with *Lewis* that the Due Process Clause requires a refund of monetary penalties when a conviction is reversed. *See Ex parte McCurley*, 412 So. 2d 1236, 1237-38 (Ala. 1982) (quoting this passage from *Lewis* and requiring a refund of fines and costs when a conviction is reversed); *State v. Piekkola*, 241 N.W.2d 563, 565 (S.D. 1976) (quoting this passage from *Lewis* and concluding that failure to

refund the defendant's money "offends common sense and severely distorts the image of justice as fairness"), *overruled on other grounds, In re Estate of Erdmann*, 447 N.W.2d 356, 359 n.2 (S.D. 1989); *People v. Nance*, 542 N.W.2d 358, 359-60 (Mich. Ct. App. 1995) (quoting this passage from *Lewis* and requiring reimbursement of money paid as a result of the defendant's conviction).[11]

The traditional rule is so sensible and fair, and Colorado's scheme is so clearly inconsistent with due process, that no other state requires defendants to prove their innocence to get their money back when their convictions are reversed.

III. This pair of cases presents an ideal vehicle for addressing this important question.

This pair of cases has all the normal attributes of a good vehicle for addressing the question presented. The question was squarely decided below. Because there was a dissenting opinion, both sides of the question were aired at length. It is the only issue in both cases. There are no procedural or jurisdictional

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[11] In a few cases, courts have denied refunds where the person seeking the refund failed to serve the proper parties, *Hooper v. State*, 248 P.3d 748, 751 (Idaho 2011); *State v. Peterson*, 280 P.3d 184, 194 (Idaho Ct. App. 2012); *State v. Owens*, 118 Wash App. 1056, *3 (2003) (unpublished opinion); *State v. Sego*, 1995 WL 454020, *2 (Tenn. Ct. Crim. App. 1995) (unpublished opinion), and where the person seeking the refund obtained a benefit in exchange for the money, *State v. Parker*, 872 P.2d 1041, 1049 (Utah Ct. App. 1994) (Davis, J., stating the view of the majority on this issue, *see id.* at 1042). Neither of these circumstances is present in our case.

obstacles that could block the Court from reaching the merits. There can be no further percolation, because no other state has a scheme like Colorado's, and the Colorado Supreme Court has definitively spoken.

But this pair of cases also has an unusual feature that makes it an exceptionally good vehicle: the factual variations within and between the two cases. We think these factual variations are irrelevant. But we recognize that others may think differently. These variations will allow for a complete resolution of the question presented.

First, the cases involve two kinds of monetary penalties: fees kept by the state and restitution that has apparently already been disbursed to victims. In our view, due process requires both kinds of penalties to be refunded by the state to the defendant when a conviction is reversed. (Whether the state may then recoup these funds from the victims is an issue for the state and the victims; it has no bearing on the due process rights of the defendant.) But one court, the Ninth Circuit, has held that while the government must return fees, once restitution has been disbursed to victims the government no longer has any obligation to return it. *United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004). Our pair of cases will give the Court an opportunity to decide whether due process principles yield a different outcome for restitution than for fees.

Second, Shannon Nelson was acquitted after her conviction was reversed, while after Louis Madden's conviction was reversed the prosecutor simply

dropped the charges. We think this difference is also irrelevant; the important thing is that neither stands convicted. If the Court thinks differently, however, this pair of cases will allow for a distinction between the two circumstances.

Third, Shannon Nelson's convictions were reversed on direct appeal, while the last of Louis Madden's convictions was reversed on collateral review. Again, our view is that this difference should not matter, but if the Court's view is that it should, this pair of cases will allow the Court to make that distinction.

For these reasons, this pair of cases presents an ideal vehicle for determining whether, and under what circumstances, Colorado's idiosyncratic scheme is inconsistent with due process.

This is an important question. It arises virtually every time a conviction is reversed, because Colorado, like other states, imposes an array of monetary penalties on virtually everyone convicted of a crime. Moreover, if Colorado can get away with keeping its citizens' money when their convictions are reversed, other states may seek to do the same. This Court should make clear that due process requires a refund of monetary penalties when a conviction is reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court of Colorado

The PEOPLE of the State of Colorado, Petitioner
v.
Shannon NELSON, Respondent

Supreme Court Case No. 13SC495
December 21, 2015
Rehearing Denied February 8, 2016

CHIEF JUSTICE RICE delivered the Opinion of the Court.

¶ 1 This case requires us to decide whether Respondent Shannon Nelson may receive a refund of costs, fees, and restitution that she paid following a conviction. Nelson's conviction was overturned and she was acquitted after a new trial. We hold that a trial court may not authorize a refund of costs, fees, or restitution following a criminal trial without statutory authority. Because none of the statutes governing the fines, fees, and restitution empowered the trial court to issue a refund, it could not do so. Exonerated defendants may seek a refund of costs, fees, and restitution, but only through a separate civil proceeding, which Nelson did not pursue.

I. Facts and Procedural History

¶ 2 In 2006, Nelson was convicted of five charges relating to sexual assaults allegedly committed against her children. The trial court sentenced Nelson to prison for twenty years to life, and ordered

that she pay court costs, fees, and restitution. Specifically, the trial court ordered Nelson to pay the following costs and fees: (1) $125.00 to the victim compensation fund, (2) $162.50 to the victims and witnesses assistance and law enforcement fund (referred to as the "VAST fund" in the Register of Actions and this opinion), (3) $35.00 for court costs, and (4) a "time payment fee" of $25.00. She was also ordered to pay $7,845.00 in restitution, bringing the total owed to $8,192.50.

¶ 3 The court of appeals reversed the judgment against Nelson and remanded for a new trial based on the improper use of an unendorsed expert witness. *People v. Shannon Kay Gonser, n/k/a Shannon Nelson*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009). In the second trial, a new jury acquitted Nelson of the five charges.

¶ 4 Between Nelson's initial conviction and subsequent acquittal, the Department of Corrections withheld $702.10 from her inmate account to pay the costs, fees, and restitution that she owed.[1] Eight months after her acquittal, Nelson filed a motion for a refund of the money she had paid toward the costs, fees, and restitution, arguing that a failure to refund the money would violate state and federal constitutional guarantees of due process. The trial court concluded that it did not have authority to order the

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[1] Nelson states that the amount withheld was $681.35. The Register of Actions, however, shows that the total amount withheld was $702.10. The payments were applied as follows:

- $125.00 to the victim compensation fund;
- $162.50 to the VAST fund; and
- $414.60 to the victims as restitution.

Department of Corrections to return the funds. Nelson appealed.

¶ 5 The court of appeals reversed the trial court's decision. *People v. Nelson*, 2013 COA 58, ¶ 36, —— P.3d ——. It held that when a defendant's conviction is overturned on appeal and upon retrial she is acquitted, she is entitled to seek a refund of costs and fees, *id.* at ¶ 16, as well as a refund of restitution, *id.* at ¶ 21. The court of appeals concluded that an order for a defendant to pay costs, fees, and restitution must be tied to a valid conviction. *Id.* at ¶¶ 12–13. It then stated that Nelson's acquittal upon retrial rendered the prior conviction invalid. *Id.* at ¶¶ 14–16. The court of appeals reasoned that the parties should be "placed in status quo" and Nelson should receive a refund. *Id.* at ¶ 15 (quoting *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588, 593 (1961)). Finally, the court of appeals determined that the State should issue the refund, because the State's action caused the "wrongful payment of restitution." *Nelson*, ¶ 29. The court of appeals acknowledged that "the [S]tate may be required to refund monies that it has already disbursed to third parties," *id.* at ¶ 28, but determined that, by disbursing the funds, the State "assumed the risk that the conviction could ultimately be overturned," *id.* at ¶ 30.

¶ 6 The People then petitioned this court for certiorari, asking whether the trial court may order a refund of restitution and, if so, which branch of the government should shoulder that burden. We granted certiorari to consider whether a trial court could issue refunds of not only restitution, but also costs

and fees, and to determine which branch, if any, should pay the refunds.[2]

II. Standard of Review

¶ 7 Whether a trial court has authority to order a refund of costs, fees, and restitution presents a question of law, which we review de novo. *See People v. Porter*, 2015 CO 34, ¶ 8, 348 P.3d 922, 924. This case involves issues of statutory construction, which we also review de novo. *Mishkin v. Young*, 107 P.3d 393, 396 (Colo. 2005).

III. Analysis

¶ 8 We begin with an overview of the statutes governing the costs, fees, and restitution ordered in this case, then proceed to a discussion of whether a trial court may authorize a refund. We hold that a trial court must have statutory authority to order a refund from public funds. A defendant may seek a refund of costs, fees, and restitution through the refund process created by sections 13–65–101 to –103, C.R.S. (2015) ("the Exoneration Act" or "the Act"). A trial court may not, however, order a refund of costs,

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[2] Specifically, we granted certiorari to review the following issues:

1. Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him.

2. Where the court of appeals ordered the State to refund restitution, which branch of the government is responsible for the refund.

fees, and restitution as part of a criminal proceeding without statutory authority to do so.

A. Legal Background

¶ 9 Nelson seeks reimbursement of restitution, costs, and fees that she paid after her initial conviction. This raises questions about the interplay between numerous statutes that govern the imposition, collection, management, and distribution of costs, fees, and restitution. *See, e.g.*, §§ 13–32–105, 18–1.3–603, 24–4.2–104(1)(d), 24–4.1–119, C.R.S. (2015). A brief review of the relevant statutes is necessary to explain the relationship between them, and how they affect a court's ability to order a refund.

1. Costs, Fees, and Surcharges

¶ 10 When Nelson was convicted after the first trial, the court ordered her to pay several costs, fees, and surcharges, totaling $347.50. First, Nelson was ordered to pay $125.00 to the crime victim compensation fund. The court orders a defendant to pay this fine when a criminal action results in a conviction or deferred judgment. § 24–4.1–119. These fines go into the crime victim compensation fund housed in each judicial district. *Id.*; § 24–4.1–117(1), C.R.S. (2015). Other than a small portion allocated to the fund's administrative costs, money in the fund is to be used "solely for the compensation of victims." § 24–4.1–117(5). Nelson paid this fee.

¶ 11 Next, the court imposed a separate charge for the VAST fund. § 24–4.2–104(1)(d). The court administrator in each judicial district is responsible for the VAST fund in that district. § 24–4.2–104(1)(a)(I).

Fees supporting this fund are "levied on each criminal action resulting in a conviction or in a deferred judgment and sentence." §§ 24–4.1–119, 24–4.2–104. Nelson paid $162.50 to the VAST fund.

¶ 12 Nelson was also charged a docket fee of $35.00, which funds the judicial stabilization cash fund and the state commission on judicial performance cash fund. § 13–32–105. Nelson did not pay this docket fee.

¶ 13 Because Nelson was unable to pay the costs, fees, and restitution on the day that she was ordered to pay, she was charged a time payment fee of $25.00. § 16–11–101.6(1), C.R.S. (2015). This fee is charged each year that the amount owed is not fully paid. *Id.* Time payment fees fund the judicial collection enhancement fund, which is located in the state treasury. § 16–11–101.6(2). The General Assembly makes annual appropriations from the fund to cover "administrative and personnel costs incurred in collecting restitution, fines, costs, fees, and other monetary assessments." *Id.* Nelson did not pay the time payment fee.

¶ 14 Nelson began paying the fees according to a payment plan because she was not able to pay them when she was convicted. When a defendant pays according to a payment plan, the payments are credited in the following order: (1) crime victim compensation fund; (2) VAST fund; (3) restitution; (4) surcharges related to the address confidentiality program; (5) time payment fee; (6) late fees; and (7) any other fines, fees, or surcharges. § 16–18.5–110, C.R.S. (2015). However, the State pays the cost of

criminal cases when a defendant is acquitted or when the court determines that the defendant is unable to pay. § 16–18–101(1), C.R.S. (2015). Because Nelson paid only a portion of what she was originally ordered to pay, the money was credited only to the victim compensation fund, the VAST fund, and toward restitution.

2. Restitution

¶ 15 In addition to these costs and fees, the court ordered Nelson to pay $7,845.00 in restitution to the victims. When a court orders a conviction, it must consider ordering restitution for any victims. § 18–1.3–603. An order of restitution is a "final civil judgment in favor of the state and any victim." § 18–1.3–603(4)(a). Moreover, "any such judgment shall remain in force until the restitution is paid in full." *Id.*

¶ 16 Restitution becomes "due and payable at the time that the order of conviction is entered." § 16–18.5–104(1), C.R.S. (2015). If no victim suffered pecuniary loss, then the court does not order restitution. § 18–1.3–603(1)(d). The amount of restitution may be increased if the court learns of additional victims or losses. § 18–1.3–603(3). It may also be decreased, either with the consent of the prosecuting attorney and the victims or if the defendant otherwise compensates the victims. *Id.*

¶ 17 The goal of ordering restitution is partly to rehabilitate defendants and deter criminal activity and partly to make victims whole. § 18–1.3–601(1)(c)–(e), C.R.S. (2015). The restitution program

aims to fully compensate victims and to take the profit out of crime. § 18–1.3–601(1)(a)–(d); *People v. Leonard*, 167 P.3d 178, 181 (Colo. App. 2007) (citing *People v. Milne*, 690 P.2d 829, 836 (Colo. 1984)).

¶ 18 If the defendant claims she cannot pay the restitution amount and is incarcerated, then the Department of Corrections investigates the defendant's ability to pay and establishes a payment plan. § 16–18.5–106, C.R.S. (2015). While a defendant is incarcerated, the Department of Corrections "may direct that a portion of the deposits into such inmate's bank account be applied to any outstanding balance." § 16–18.5–106(2). If the defendant is not in custody and claims she cannot pay, she must report to the Collections Investigator, who investigates the defendant's ability to pay and establishes a payment schedule with the defendant. § 16–18.5–104(3)–(4). The Collections Investigator is responsible for monitoring the defendant's restitution payments. § 16–18.5–105, C.R.S. (2015).

¶ 19 Victims have the right to pursue collection of restitution. § 16–18.5–107(1), C.R.S. (2015). But if a victim elects not to pursue it, the Collections Investigator or Department of Corrections must do so. § 16–18.5–107(4). If "no victim can be reasonably located or the victim declines to accept restitution," the defendant pays the restitution amount to the State. § 16–18.5–109, C.R.S. (2015). Restitution paid to the State is transferred to the VAST fund in the judicial district where the crime occurred. § 24–4.1–117. The money is then distributed between the VAST fund and the crime victim compensation fund. § 16–18.5–109(3). Of the total amount that Nelson

paid, $414.60 was disbursed to the victims as restitution.

3. Crime Victim Compensation Act

¶ 20 The People suggest that if a court may order a refund of restitution, then the money should come from the crime victim compensation fund. However, an examination of the statutes governing the crime victim compensation fund reveals no authority by which the court could order a withdrawal from this fund to reimburse Nelson.

¶ 21 In 1981, the General Assembly created the Crime Victim Compensation Program to protect and assist the victims of crimes and their immediate family members by "lessening the financial burden placed upon victims due to the commission of crimes." § 24–4.1–101, C.R.S. (2015). The General Assembly instructed that the statute be "liberally construed" to accomplish its stated purpose. *Id.*

¶ 22 To achieve this purpose, the Crime Victim Compensation Act established a crime victim compensation board ("the board") in each judicial district. §§ 24–4.1–102(3), –103(1), C.R.S. (2015). In each district, the District Attorney appoints three members to the board. § 24–4.1–103(1). The District Attorney and her staff assist the board in performing its duties. § 24–4.1–104, C.R.S. (2015). This board considers applications to determine whether a victim is entitled to compensation and how much the victim should receive. §§ 24–4.1–106 to –109, C.R.S. (2015).

¶ 23 The Crime Victim Compensation Act also created a crime victim compensation fund in each

judicial district. § 24–4.1–117(1). This fund consists of the money received from costs and surcharges levied on criminal convictions, any federal money available for victim compensation, plus refunds from victims who receive an award from the fund in addition to damages or restitution from the defendant. § 24–4.1–117(2); *see also* § 24–4.1–119 (listing the costs and surcharges that finance the fund). The fees are "levied on each criminal action resulting in a conviction or in a deferred judgment and sentence." § 24–4.1–119(1)(a).

¶ 24 "All moneys deposited in the fund shall be used solely for the compensation of victims," other than a small carve-out of 12.5% for administrative costs. § 24–4.1–117(5). The District Attorney may use no more than 10% of the fund for administrative costs, and the Court Administrator may use 2.5% for costs. *Id.*

¶ 25 The Court Administrator in each judicial district is the custodian of the fund. § 24–4.1–118, C.R.S. (2015). The Court Administrator makes disbursements from the fund to compensate victims upon written authorization of either the board or the court. *Id.* Each year, the Court Administrators in each judicial district report the amount of money collected and distributed under the fund to the state Court Administrator. § 24–4.1–122, C.R.S. (2015).

¶ 26 The Crime Victim Compensation Act also created an advisory board, which functions under the Division of Criminal Justice in the Department of Public Safety. § 24–4.1–117.3(1), C.R.S. (2015). The Executive Director of the Department of Public

Safety sits on the board and appoints at least seventeen members of various backgrounds to the board. § 24–4.1–117.3(2). The advisory board develops and revises standards for the administration of the fund, investigates and imposes sanctions for violating those standards, distributes seized profits from crime, and advises the division of criminal justice concerning grant awards. § 24–4.1–117.3(3).

¶ 27 The fund is intended to be the payor of last resort. § 24–4.1–110(2), C.R.S. (2015). When a victim receives compensation from another source (such as restitution from the defendant), in addition to compensation from the fund, the victim must refund either the lesser sum or the amount of compensation that exceeds his losses. *Id.* Any payment that the victim receives from the fund may not be assigned or subject to attachment until after the victim or his beneficiary actually receives the payment. § 24–4.1–114, C.R.S. (2015). "The acceptance of an award ... shall subrogate the state, to the extent of such award, to any right or right of action accruing to the applicant." § 24–4.1–116, C.R.S. (2015).

¶ 28 The crime victim compensation fund's purpose is clear: the money is to be used to compensate crime victims. Several bodies—including the board, the advisory board, and the court administrators—exercise some control over the fund. All of these bodies, however, are governed by the same restriction. Other than a small amount dedicated to administrative costs, the fund is to be used "*solely* for the compensation of victims." § 24–4.1–117(5) (emphasis added). Nothing in the statute authorizes the court to withdraw funds for a refund to the defendant.

4. The Exoneration Act

¶ 29 The Exoneration Act authorizes a court to issue refunds to exonerated defendants, but, because Nelson did not file a claim under the Act, it does not apply to this case.[3] *See* §§ 13–65–101 to –103. In 2013, the General Assembly enacted the Exoneration Act, which created a civil claim for relief for exonerated persons who had been convicted of a felony and sentenced to a term of incarceration. § 13–65–102(1). This statute aims to compensate an innocent person who was wrongly convicted. Ch. 409, sec. 1, 2013 Colo. Sess. Laws 2412, 2412. The Act outlines a process for exonerated defendants to seek a refund of fines, penalties, costs, and restitution, along with additional compensation. §§ 13–65–101 to –103.

¶ 30 To receive compensation under the Act, the exonerated person must prove, by clear and convincing evidence, that she was "actually innocent." §§ 13–65–101(1)(a); 13–65–102(1)(a). To be considered actually innocent under the Act, the exonerated person must show either that her conviction was the result of a miscarriage of justice or that she is factually innocent. § 13–65–101(1)(a)(I)–(II). Insufficiency of

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[3] The Exoneration Act was not passed until 2013, after Nelson made her initial motion requesting a refund. However, the Act allowed defendants to seek relief, even if they met the criteria prior to the Act's passage, as long as they acted before June 5, 2015. § 13–65–102(1)(b)(II), C.R.S. (2015). Nelson did not seek a refund through procedures created by the Act in the allotted two-year time frame. Therefore, whether she met the other criteria that the Act demands, such as actual innocence, is not before us.

the evidence or a legal error unrelated to the person's actual innocence cannot support either exoneration or subsequent compensation under the Act. §§ 13–65–101(1)(b); 13–65–102(2)(a)(I)–(II).

¶ 31 If a person is exonerated, she is entitled to compensation for her wrongful conviction and sentence. § 13–65–103(1). If a district court finds that the exonerated person is eligible for compensation, it directs the Court administrator to compensate her. *Id.* The General Assembly funds the Act through a general-fund appropriation, which is allocated to the judicial department. *See* Ch. 409, sec. 2, 2014 Colo. Sess. Laws. 2381, 2510.

¶ 32 Compensation from the State may include $70,000.00 per year of incarceration, tuition waivers, and reasonable attorney fees for bringing a claim under the Act. § 13–65–103. The Act also contemplates a refund of all costs and fees that the exonerated person was required to pay as a result of the wrongful conviction. § 13–65–103(2)(e)(V) (stating that an exonerated person may be refunded "[t]he amount any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication").

¶ 33 Nelson did not seek a refund through this process. She filed a motion for a refund several months after her acquittal, in connection with her criminal trial. Nelson asks this court to determine whether she may seek a refund of costs, fees, and restitution as part of a criminal trial after an initial

conviction has been overturned, apart from the process that exists under the Exoneration Act.

B. Statutory Authority for Refunds from Public Funds

¶ 34 The General Assembly authorizes the collection, management, and distribution of the funds raised by costs, fees, and restitution pursuant to its power to define crimes and sentences, raise revenue, and make appropriations. These powers are inherently legislative, and a court may not intrude on the General Assembly's power by authorizing a refund from public funds without statutory authority to do so. *See* Colo. Const. art III; *People v. Dist. Court, City & Cty. of Denver*, 808 P.2d 831, 835 (Colo. 1991). The Exoneration Act provides the sole statutory authority for the court to issue a refund to criminal defendants after their convictions are overturned. *See* §§ 13–65–101 to –103.

¶ 35 As a threshold matter, the court had clear authority to impose, collect, and disburse the costs, fees, and restitution. First, the court correctly ordered—and the Department of Corrections correctly withheld—money from Nelson based on her initial conviction. The General Assembly instructed the court to impose costs, fees, and restitution pursuant to its power to define crimes and prescribe punishments. *See Martinez v. People*, 69 P.3d 1029, 1031 (Colo. 2003). Courts order defendants to pay costs, fees, and restitution that are tied to criminal convictions—but only to the extent permitted by statute. *See id.*; *see also, e.g.*, §§ 24–4.1–119, 24–4.2–104(1)(d), 13–32–105, 18–1.3–603. The General As-

sembly prescribes the punishments for crimes and, in doing so, limits the court's sentencing authority. *People v. Oglethorpe*, 87 P.3d 129, 136 (Colo. App. 2003), *as modified on denial of reh'g* (Aug. 14, 2003). Once the court imposes the sentence, the executive branch carries it out. *Id.*; *see* § 16–18.5–106 (authorizing the Department of Corrections to take money from an inmate's account to pay outstanding fees).

¶ 36 In Nelson's case, the court ordered Nelson to pay numerous costs and fees that were each mandated by statute. *See, e.g.*, §§ 24–4.1–119, 24–4.2–104. The statutes instruct that the charges must be levied when a case results in a conviction, and that the defendant must pay the charges. *See, e.g.*, §§ 24–4.1–119, 24–4.2–104. The court must carry out the statutes' instructions. *See Oglethorpe*, 87 P.3d at 136. The court must impose the fees when a conviction occurs and must also use the funds as the statutes instruct. Therefore, the trial court properly ordered Nelson to pay costs, fees, and restitution pursuant to valid statutes.

¶ 37 Next, after collecting fines, fees, and restitution, the court correctly distributed the funds to victims and public funds, as ordered by the statutes. *See, e.g.*, §§ 18–1.3–601, 24–4.1–117, 24–4.2–104. The General Assembly directs when these fees may be collected and how the money may be used based on its power to raise revenue and appropriate funds. *See* Colo. Const. art. V, §§ 31–32. This power "is plenary, subject only to constitutional limitations." *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1380 (Colo. 1985). The General Assembly must raise revenue to create a source of funding for its appropriations to

cover the expenses of the executive, legislative, and judicial departments. *Id.* at 1380–81 (citing Colo. Const. art. V, §§ 31–32).

¶ 38 Because the General Assembly must be able to plan and budget to fulfill its duties, Colorado's constitution protects its control over public money. Colo. Const. art. V, § 33. "No moneys in the state treasury shall be disbursed ... except upon appropriations made by law, or otherwise authorized by law." *Id.* The General Assembly must be able to plan and monitor public money so that sufficient funds are available to support appropriations. *Lamm*, 704 P.2d at 1381. We have held that the ability to specify which funds support which appropriations, and to make appropriations contingent on the availability of money in those funds, is "essential to the legislative power." *Id.*

¶ 39 In this case, $414.60 was distributed to victims and $347.50 was placed into public funds, according to the statutes governing each fee. A court does not "assume the risk" that a conviction will be overturned by following these statutory commands. *Contra Nelson*, ¶ 30. Rather, when the court orders a convicted defendant to pay costs, fees, and restitution—pursuant to statutory commands—the court must also follow the statutes' instructions on how that money may be used. For example, the court was required to distribute the money that Nelson paid toward restitution to the victims. *See* § 18–1.3–601. Similarly, the court was required to disburse the money collected from costs and fees into public funds. *See, e.g.*, §§ 24–4.1–117(2), 24–4.1–119(1)(a); *see also* § 16–18.5–109(3) (directing that restitution

money be placed in the VAST and crime victim compensation funds when a victim declines to accept restitution or no victim can be reasonably found). The court correctly disbursed the costs, fees, and restitution that Nelson paid to either the victims or public funds, according to the governing statutes.

¶ 40 Just as the court must follow statutory commands in imposing and disbursing fees, the court may authorize refunds from public funds only pursuant to statutory authority.[4] *See People v. $11,200.00 U.S. Currency*, 2013 CO 64, ¶ 4, 313 P.3d 554, 555–56 (holding that the trial court lacked authority to order a refund where the defendant's case did not meet the specific statutory requirements authorizing a refund). The court may not intrude on the legislature's powers by authorizing refunds from public funds. *See* Colo. Const. art. III (stating that each branch of government may not intrude on another's powers absent express constitutional permission); *cf. Lamm*, 704 P.2d at 1385 (avoiding "the impermissible positive effect" of the executive branch

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[4] Once the state disburses restitution to the victims, the state no longer controls that money. *See* § 18–1.3–601. Neither the defendant nor the court may seek a refund of restitution from the victims. *See* § 13–65–103(2)(e)(V); *see also* § 24–4.1–302.5(1)(a), C.R.S. (2015) (affirming victims' right to be free from harassment). Even when a defendant is exonerated after a finding of actual innocence, victims are not required to reimburse the defendant for any restitution payments they received. § 13–65–103(2)(e)(V) (emphasizing that allowing a refund of restitution to an exonerated defendant "shall not be interpreted to require the reimbursement of restitution payments by" a victim). As a result, any potential refund of restitution could come only from a public fund.

forcing funding to come from otherwise-appropriated funds, which would invade the legislature's appropriation power). A court order awarding money "payable from public funds implicates sensitive budget and funding considerations, and authority to intrude into these areas is not to be lightly implied." *Dist. Court, City & Cty. of Denver*, 808 P.2d at 835. For this reason, we have held that "a monetary sanction payable from public funds ... is beyond the authority of the trial court." *Id.*

¶ 41 If the court were to refund Nelson's costs and fees, the refund would draw on public funds, thereby affecting appropriations from that fund. The refund would diminish those public funds and disregard the legislature's directives on how that money is to be spent or appropriated. This would impermissibly intrude on the legislature's power and hamstring its ability to fulfill its responsibility to raise and appropriate funds. Therefore, a court must have statutory authority to authorize a refund from public funds, and it did not in this case.

¶ 42 Finally, we turn to the possible statutory authority that might permit a court to order a refund. Nelson argues that the statutes governing costs, fees, and restitution provide statutory authority to support refunds. Nelson argues that, because the orders to pay costs, fees, and restitution must all be tied to a conviction, her acquittal renders the initial conviction invalid, and the money must be returned. This argument fails for two reasons. First, the court and the Department of Corrections followed the instructions laid out in the statutes governing costs and fees. The court correctly withheld money from

Nelson as part of her initial conviction: the fines were tied to a conviction. Furthermore, Nelson was required to make payments toward the costs, fees, and restitution she owed only while her conviction stood. The costs, fees, and restitution were therefore imposed based on a conviction, and the obligation to pay ceased when the conviction was no longer in place. The statutes authorized the imposition and collection of fees but did not address the possibility of a refund.

¶ 43 Second, the Exoneration Act provides the proper procedure for seeking a refund. When examining the relationship between statutory provisions, "a special or specific statutory provision prevails over a general provision." *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168, 1174 (Colo. 1991) (citing § 2–4–205, 1B C.R.S. (1980) (now codified at § 2–4–205, C.R.S. (2015))). We also presume that the legislature is aware of its prior enactments when it passes new legislation. *A.S. v. People*, 2013 CO 63, ¶ 11, 312 P.3d 168, 171.

¶ 44 None of the statutes governing costs, fees, and restitution address whether a court may withdraw money from public funds to refund money that a defendant has already paid. *See, e.g.*, §§ 18–1.3–603, 24–4.1–117, 24–4.1–119. On the other hand, the Exoneration Act specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution. § 13–65–103(2)(e)(V). When creating a refund procedure for exonerated defendants, the General Assembly did not amend the existing statutes to create alternative means for defendants to seek a refund. The Exonera-

tion Act created an exclusive process for exonerated defendants seeking a refund of costs, fees, and restitution.

¶ 45 Therefore, when a defendant's conviction is overturned and she is acquitted after a new trial, the trial court may authorize a refund of costs, fees, and restitution only pursuant to the process created in the Exoneration Act. Accordingly, the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution based on her motion following her criminal trial.

C. No Due Process Violation

¶ 46 In her motion requesting a refund, Nelson argued that, upon her acquittal, due process required an automatic refund of costs and fees that she had paid. Nelson argues that the money was wrongfully withheld and that the interests of justice require a refund of the costs and fees she paid because her conviction was overturned.[5] We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted. The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction.

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[5] Nelson relies on *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588, 593 (1961), to suggest that parties must be placed in the "*status quo*" after a conviction is reversed. However, *Toland* does not apply here. Unlike Nelson, the defendant in *Toland* was subject to a "hasty, ill considered, dark of night disposition" of his case, which was "not an acceptable substitute for a trial." *Id.* at 593.

¶ 47 No person shall be denied property without due process of law. U.S. Const. amend. V; *id.* amend. XIV § 1; Colo. Const. art. II, § 25. "Due process requires, at a minimum, notice and the opportunity for a meaningful hearing before an impartial tribunal." *Van Sickle v. Boyes*, 797 P.2d 1267, 1273–74 (Colo. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 348–49, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). When a criminal defendant is convicted, the court must order defendants to pay certain costs. *See supra* ¶¶ 10–14; *see, e.g.*, § 24–4.1–119(1)(a) (crime victim compensation fund); § 13–32–105 (docket fees). If a defendant is acquitted, however, section 16–18–101(1) requires the State to pay the court costs.

¶ 48 In this case, the money was not wrongfully withheld because a conviction supported the imposition of costs, fees, and restitution. *See supra* ¶¶10–14; *see also, e.g.*, § 16–18.5–104 (stating that restitution becomes "due and payable at the time that the order of conviction is entered"). Nelson was initially convicted after a jury trial, so the court was authorized to order Nelson to pay costs, fees, and restitution at that time. Nelson was not ordered to pay costs and fees for the second trial, when she was acquitted. *See* § 16–18–101(1). Nelson was obligated to pay only while her conviction was in place and this obligation was imposed pursuant to a valid statute. Accordingly, she was not deprived of due process.

¶ 49 Moreover, as explained, the General Assembly has provided a process for defendants to seek refunds. *See* §§ 13–65–101 to –103. Nelson did not file an action under the Exoneration Act, which allows a court to grant refunds of fees and restitution, along

with compensation for the time an exonerated defendant spent incarcerated. *See* §§ 13–65–101 to –103. Due process does not require a defendant to be compensated automatically for the time she spent incarcerated while seeking an appeal or new trial. Similarly, due process does not require an automatic refund of fines paid in connection with a conviction during that time.

¶ 50 The Exoneration Act provides sufficient process for defendants to seek a refund of costs, fees, and restitution that they incurred while a conviction was in place. Therefore, requiring a defendant to seek a refund of costs, fees, and restitution through the process created by the legislature, rather than upon a motion after a criminal trial, does not violate due process.

IV. Conclusion

¶ 51 The trial court did not have the authority to grant a refund of costs, fees, and restitution to Nelson. If a criminal defendant wishes to seek a refund, the Exoneration Act provides the only procedure to do so. Accordingly, we reverse the court of appeals' ruling and remand the case for proceedings consistent with this opinion.

JUSTICE HOOD dissents.

JUSTICE GABRIEL does not participate.

JUSTICE HOOD, dissenting.

¶ 1 The majority concludes the State may deprive a person of her property as a result of a criminal conviction and that it may retain the property even

after the person shows on appeal that the conviction is invalid. It finds that, while the legislature has provided for the collection and expenditure of a convicted defendant's money, the legislature has not provided for refunds and therefore criminal courts lack authority to issue refunds. To obtain relief, the majority requires Shannon Nelson to mount a new lawsuit and prove her innocence under the Compensation for Certain Exonerated Persons Act ("Exoneration Act" or "Act").

¶ 2 Because Nelson is legally innocent, I would begin at a different place. Instead of requiring Nelson to identify a specific statute authorizing a refund, I would require the State to identify a source of law allowing it to keep a defendant's property in the absence of a valid criminal conviction. Because I know of no such authority, and I agree with the court of appeals that the district court had jurisdiction to order a refund, I respectfully dissent.

I. Nelson Has Never Been Validly Convicted.

¶ 3 The majority quickly moves over the procedural history of Nelson's case, but it is worth a closer look. In 2006, Nelson stood trial for crimes of sexual abuse allegedly perpetrated against her four children. The prosecution's case depended heavily on the children's testimony and out-of-court statements. At trial, the People called as a witness a forensic interviewer who had spoken with the children. When the People posed a question about the nature of children's memories, Nelson objected because the witness had not been endorsed as an expert. The trial court acknowledged the witness was not qualified as

an expert and that in the past it had been "reluctant" to qualify her, but the court felt that based on the interviewer's continuing training and growing experience she would "at some point in the future ... be qualifiable as an expert." The court overruled Nelson's objection. The interviewer went on to testify about the age at which children have the ability to remember information and relate it accurately; she also described the ways children disclose trauma and the reliability of such disclosures. The jury convicted Nelson of five charges—sexual assault on a child, aggravated incest, and three counts of misdemeanor child abuse. She appealed.

¶ 4 The court of appeals reversed her convictions in a unanimous opinion. *People v. Shannon Kay Gonser, n/k/a Shannon Nelson*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009). The division concluded the trial court erred by allowing a lay witness to testify on matters requiring specialized knowledge and training. It further concluded this error was prejudicial. The error impaired the fairness of Nelson's trial by affecting the jury's ability to evaluate the credibility of the alleged victims. Consequently, the court reversed her convictions and remanded for a new trial.

¶ 5 The prosecution retried Nelson. A jury acquitted her.

¶ 6 Because Nelson was never validly convicted, we presume she is innocent. This, of course, is one of our bedrock concepts of criminal justice. *See Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) ("[The presumption of innocence] is

the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). Thus, just as the State was required to release Nelson from incarceration, it should also be required to release Nelson's money paid as costs, fees, and restitution.

II. The State's Appellate Process Must Comport with Due Process.

¶ 7 This case stands at the confluence of the legislature's choice to provide appellate review of convictions and its choice to collect money from defendants before convictions are final. Though the Supreme Court has said the federal Constitution guarantees no right to an appeal, *see McKane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894), when the legislature creates one, as Colorado has done, *see* § 16–12–101, C.R.S. (2015), a criminal defendant is entitled to due process throughout the appeal. *Hoang v. People*, 2014 CO 27, ¶ 39, 323 P.3d 780, 788; *see also, e.g., Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (holding that when a state provides a first appeal as of right, due process requires that defendants receive the effective assistance of counsel during that appeal). Knowing this, the legislature might have decided not to order defendants to pay costs, fees, and restitution until judgments survive direct appeal. While requiring defendants to pay up sooner is understandable, I struggle to see how we can sanction a system that makes money immediately due without providing for its return when reversible error occurs.

¶ 8 Like the majority, I see nothing wrong with a court following the statutory plan for the collection and use of a convicted defendant's funds, *see* maj. op. ¶ 39; nor is there anything objectionable about requiring defendants to comply with existing court orders to pay costs, fees, and restitution stemming from valid convictions and requiring defendants who wish to challenge their convictions to use the normal channels. But when the process leading to the conviction is exposed as so deficient as to mandate reversal, "due" process should also allow for the return of a defendant's money.

¶ 9 This court shared my concern in *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588, 593 (1961), when we required the return of a defendant's fines and costs paid pursuant to a conviction obtained in violation of due process. Today, the majority relegates *Toland* to a footnote and emphasizes that the defendant there suffered a summary disposition of his case immediately after arrest—a situation that presented obvious due process problems. *See* maj. op. ¶ 46, n.5; *Toland*, 364 P.2d at 593 (concluding the "summary, hasty, middle of the night justice" dispensed to a suspected drunk driver after a crash did not comport with due process). By distinguishing *Toland*, the majority sets up two tiers of invalid convictions: There are stark constitutional violations, like those in *Toland*, that demand setting the defendant back to the status quo ante, and then there are arguably less egregious but nonetheless invalid convictions, like Nelson's, for which reimbursement is unavailable. But reversal is reversal. And an invalid conviction is no conviction at all.

¶ 10 Other courts have recognized what the interests of justice compel in similar circumstances. *See United States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir. 2004) (holding that, where the defendant's conviction was reversed on collateral review, the government must return amounts paid as special assessments and costs, though it need not reimburse for restitution disbursed after the conviction became final); *Telink, Inc. v. United States*, 24 F.3d 42, 47 (9th Cir. 1994) ("If [the defendants] prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action...."); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines."); *United States v. Beckner*, 16 F. Supp. 2d 677, 679 (M.D. La. 1998) ("[T]his court has jurisdiction to carry out its obligation to completely vacate all aspects of the erroneous judgement [sic] issued by it.... In this criminal case the final judgment is that Beckner owed restitution to no one.... The government must reimburse Beckner...."); *United States v. Venneri*, 782 F. Supp. 1091, 1092–95 (D. Md.1991) (describing previous order requiring government to refund a defendant's fine paid for violating an unconstitutional statute and ordering third-party restitution recipient to repay defendant); *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Dist. Ct. App.1980) (holding lower court had inherent power to restore defendant to status quo ante for wrongly paid fine, restitution, and probation costs); *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012) (finding trial court had ju-

risdiction to consider defendant's refund petition after his convictions were overturned on direct appeal). *But see Hooper v. State*, 150 Idaho 497, 248 P.3d 748, 751 (2011) (holding that the trial court could not award a refund of restitution where the defendant's payments had gone to the state's Industrial Commission over which the court lacked personal jurisdiction).

¶ 11 The majority finds no due process problem and refers Nelson to the Exoneration Act. *See* maj. op. ¶¶ 29–33, 46–50 (discussing §§ 13–65–101 to –103, C.R.S. (2015)). It proceeds as though litigants merely needed directions on where to ask for relief. *See id.* at ¶33 (explaining that Nelson filed a motion in criminal court instead of filing a civil claim). But the Exoneration Act is not the answer to Nelson's problem.

III. The Exoneration Act Is an Inadequate Remedy.

¶ 12 The Act is not up to the task the majority assigns it for several reasons. First and foremost, requiring defendants who have never been validly convicted to resort to this Act flips the presumption of innocence. The Act establishes a separate civil claim that puts the burden on the petitioner to demonstrate her actual innocence by clear and convincing evidence. § 13–65–102(4)(a)(I), (6)(b).

¶ 13 Second, the Act is not geared toward refunds. As the majority explains, the Exoneration Act provides not just a refund but also $70,000 for every year of wrongful incarceration, plus attorneys' fees

and other benefits. *See* maj. op. ¶ 32; *see also* § 13–65–103(2)–(3). The legislature is free to establish this broad relief and to require a petitioner to prove she is entitled to it. But Nelson is not seeking such broad relief; she is merely asking for a return to the status quo ante.[1] *See Toland*, 364 P.2d at 593.

¶ 14 Third, the majority ignores the impracticability of bringing a separate civil action. Defendants are not entitled to state-provided counsel in this context, which means they must retain a lawyer or find one willing to work for free. Defendants with meritorious claims paying hourly rates could find themselves throwing good money after bad, while the relatively low amounts available will likely prevent most defendants from retaining counsel on a contingency basis.

¶ 15 Therefore, I respectfully disagree with the majority's determination that the Exoneration Act provides "sufficient process" for defendants in Nelson's situation. Maj. op. ¶ 46. The Act serves different goals and provides a different remedy. Of course, this begs the question whether the judiciary has the authority to provide an alternative remedy.

IV. The Criminal Court May Award a Refund.

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[1] The Exoneration Act provides Nelson no recourse whatsoever for the money withheld due to her invalid misdemeanor convictions. Though misdemeanor convictions can subject individuals to various costs, *see, e.g.*, § 24–4.1–119(1)(a), C.R.S. (2015) (imposing $78 charge for a misdemeanor conviction), and restitution, *see* § 18–1.3–603(1), C.R.S. (2015), the Exoneration Act grants relief only to "a person who has been convicted of a *felony*," § 13–65–102(1)(a) (emphasis added).

¶ 16 Ancillary jurisdiction gives us that authority. In a well-reasoned and unanimous opinion, authored by then-Judge Gabriel, the court of appeals relied on the ancillary jurisdiction analysis articulated in *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969), and previously used by the court of appeals in *People v. Hargrave*, 179 P.3d 226, 229–30 (Colo. App. 2007). *See People v. Nelson*, 2013 COA 58, ¶¶ 24–26, —— P.3d ——.

¶ 17 Ancillary jurisdiction allows a court to decide certain matters related to the principal proceeding. "[A]ll courts, absent some specific statutory denial of power, possess ancillary powers to effectuate their jurisdiction." *Morrow*, 417 F.2d at 737. At issue in *Morrow* was whether a criminal court could issue an order preventing the dissemination of a defendant's arrest record after the case stemming from his arrest was dismissed. The United States Court of Appeals for the District of Columbia Circuit held the city's criminal court did have such ancillary jurisdiction. *Id.* at 740–41. "The major purpose of ancillary jurisdiction ... is to insure that a judgment of a court is given full effect; ancillary orders will issue when a party's actions, either directly or indirectly, threaten to compromise the effect of the court's judgment." *Id.* at 740.

¶ 18 Applying the test articulated in *Morrow*, *see id.* the court of appeals concluded the trial court had ancillary jurisdiction over Nelson's refund petition: The refund matter arose from the same transaction as the main proceeding (Nelson's criminal case); deciding the refund question did not require substantial new factfinding; nor would adjudication deprive

a party of a substantial procedural or substantive right; and finally, resolution of the ancillary matter was required to prevent frustration of the underlying criminal matter. *Nelson*, ¶ 25 (citing *Hargrave*, 179 P.3d at 229–30).

¶ 19 The court of appeals justifiably noted this approach also (1) serves judicial economy by preempting the need for defendants to file a separate civil action, *see id.* at ¶¶ 23, 26; *see also Morrow*, 417 F.2d at 740 (citing judicial economy as another purpose of ancillary jurisdiction); and (2) avoids "a scenario in which former criminal defendants are left to seek out and file lawsuits or other proceedings against third parties, and especially crime victims, to recover the restitution amounts that the defendants previously paid," *Nelson*, ¶ 31.

¶ 20 The majority raises another jurisdictional concern with this approach, one implicating the separation of powers. *See* maj. op. ¶ 34. Apart from a court's ability to hear a defendant's request for a refund, the majority argues courts cannot award a refund of costs, fees, and restitution in the absence of statutory authorization. *See id.* at ¶40. To grant a refund without statutory backing would be, in the majority's view, to "intrude on the General Assembly's power" to define crimes and sentences, raise revenue, and make appropriations. *Id.* at ¶34. These powers are undeniably important and they undoubtedly reside in the legislature, but they are nevertheless subject to constitutional constraints such as due process. *See* Colo. Const. art. II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law.").

¶ 21 Refunds simply recognize that the legislature lacks power to punish people who have not been validly convicted. They do not intrude on the power to define crimes and sentences.

¶ 22 As for the budgetary powers, the legislature itself recognizes the State's obligation to provide the court system with the resources it needs to function: Section 13–3–104—"State shall fund courts"—provides, "The state of Colorado shall provide funds by annual appropriation for the operations, salaries, and other expenses of all courts of record within the state...." § 13–3–104(1), C.R.S. (2015). As I see it, the obligation to refund money taken from defendants whom the State never validly convicted is part of the "operations" of courts; it is the cost of doing business, or here, an expense of doing justice.

¶ 23 Despite this, the majority argues that our precedent prohibits a court from ordering a refund absent more specific statutory authority. Our cases do not stand for such a broad principle. The majority leads with *People v. $11,200.00 U.S. Currency*, 2013 CO 64, 313 P.3d 554, where a defendant sought a refund of money lost through civil forfeiture. He relied on a particular statute that provided for the return of property only where the related criminal action terminated in an acquittal or dismissal while the forfeiture action was pending. *See id.* at ¶¶ 4, 13, 313 P.3d at 555–56, 558 (discussing § 16–13–307(1.6), C.R.S. (2013)). The defendant's forfeiture action, which we repeatedly stressed he never bothered to appeal, *see id.* at ¶¶ 3, 8, 28, 313 P.3d at 555–57, 561, became final long before his conviction was reversed on appeal, *see id.* at ¶¶ 5–10, 313 P.3d at

556–57. Thus, in that situation, that statute did not cover that defendant. Here, by contrast, Nelson seeks relief from the invalid criminal convictions themselves; she appealed those convictions and won. And while the restitution obligation is an independent civil judgment, *see* § 18–1.3–603(4)(a), C.R.S. (2015), it is tethered to the criminal conviction, *see* § 18–1.3–603(1) ("Every order of conviction ... shall include consideration of restitution."). Indeed, restitution is punishment for the crime. *See* § 18–1.3–601(1)(b)–(d) (setting forth "moral," rehabilitative, and deterrence rationales).

¶ 24 The majority also relies on *People v. District Court*, 808 P.2d 831, 835 (Colo. 1991), where we merely held that a trial court's remedial authority under Crim. P. 16 does not include the power to order the prosecution to pay the defendant's attorneys' fees. But a trial court's power to redress discovery abuses does not address our issue here: Whether the criminal court can refund costs, fees, and restitution to a defendant who was not validly convicted. Moreover, even if the case stood for the broad proposition the majority cites—"a monetary sanction payable from public funds ... is beyond the authority of the trial court," maj. op. ¶ 40 (omission in original) (quoting *Dist. Court*, 808 P.2d at 835)—a refund is not a "sanction" against the government; it is the return of a defendant's money.

¶ 25 Thus, our cases do not hold that the State may retain a defendant's funds after she demonstrates her conviction is invalid. In fact, our closest case says just the opposite. *See Toland*, 364 P.2d at 593.

¶ 26 Furthermore, the majority concedes that Nelson's repayment obligation "ceased when the conviction was no longer in place." Maj. op. ¶ 42; *see also id.* at ¶48 ("Nelson was obligated to pay only while her conviction was in place...."). Thus, the majority allows a court to grant a defendant prospective relief from an outstanding financial obligation that traces to an invalid conviction. This means the majority allows a court to cut off the flow of funds to victims and the State, but forbids a court-ordered refund. Yet the same reasoning compels relief in both directions: The defendant was not validly convicted.

¶ 27 The majority's budgetary concerns should also be tempered by the reality that many defendants are indigent and most convictions are affirmed. In fiscal year 2014, the court of appeals outright reversed on direct appeal in only 45 criminal cases, and, dating back to 2005, the annual number was never more than 67 (fiscal year 2008).[2] Even these numbers somewhat overstate the matter. The relevant number is the number of cases where, after reversal, the defendant was acquitted or never retried. And from within this group, only the defendants who paid something in the interim are affected. Nelson paid barely more than $700 while subject to her invalid convictions. While from the perspective of the State's total budget these sums are small, the underlying due process principle is large.

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[2] Data obtained from the Clerk of the Colorado Supreme Court and the Colorado Court of Appeals.

¶ 28 The legislature's choice to provide appellate review of convictions, when met with its choice to collect money from defendants before those convictions become final, implicates difficult public policy questions. Given the logistical complexities, the court of appeals was right to invite legislative participation. *See Nelson*, ¶ 34. But unlike the majority, I would require the legislature to confront those challenges. The legislature may decide for itself how to provide refunds, but I would not allow the State to retain a defendant's money on the basis of a conviction known to be invalid.

¶ 29 I conclude that the State was not authorized to retain Nelson's money. The district court had jurisdiction to order a refund. Therefore, I respectfully dissent.

APPENDIX B

Supreme Court of Colorado

The PEOPLE of the State of Colorado, Petitioner,
v.
Louis Alonzo MADDEN, Respondent.

Supreme Court Case No. 13SC496
December 21, 2015
Rehearing Denied February 8, 2016

CHIEF JUSTICE RICE delivered the Opinion of the Court.

¶ 1 This case requires us to decide whether the trial court had authority to refund costs, fees, and restitution that Respondent Louis Alonzo Madden had paid following his conviction. Madden's conviction was vacated and the prosecution elected not to retry him. None of the statutes governing the costs, fees, and restitution that Madden was ordered to pay address whether the court may draw on those funds. Similarly, procedural rules for defendants seeking post-conviction relief do not address whether a court may order refunds from public funds. Madden did not pursue a refund through the procedures defined in the Exoneration Act, which provides statutory authority for a trial court to issue a refund. Therefore, the trial court did not have statutory authority to order a refund from public funds in this case.

I. Facts and Procedural History

¶ 2 In 2005, Madden was convicted of attempting to patronize a prostituted child and attempted third degree sexual assault by force. See §§ 18–2–101, 18–7–406(1), C.R.S. (2015); 18–3–404, C.R.S. (1999). Madden was originally sentenced to an indeterminate sentence and was ordered to pay costs, fees, and restitution. Specifically, the trial court ordered Madden to pay the following costs and fees: (1) $125.00 to the victim compensation fund, (2) $125.00 to the victims and witnesses assistance and law enforcement fund (referred to as the "VAST" fund in the Register of Actions and this opinion), (3) $30.00 for court costs, (4) $45.00 for a drug standardized assessment, (5) $25.00 for drug testing, (6) $1,000.00 for a special advocate surcharge, (7) $2,000.00 for a sex offender surcharge, (8) $128.00 to the sex offender identification fund, and (9) a "time payment fee" of $25.00. He was also ordered to pay $910.00 in restitution, bringing the total owed to $4,413.00.

¶ 3 On appeal, we reviewed Madden's case and reversed his conviction of attempting to patronize a prostituted child, leaving only his attempted sexual assault conviction intact. *People v. Madden*, 111 P.3d 452, 460 (Colo. 2005). We remanded to the court of appeals, which then returned the case to the trial court with instructions to impose a determinate sentence. *People v. Madden*, No. 02CA0024, slip op. at 4, 2005 WL 1692643 (Colo. App. July 21, 2005). The trial court sentenced Madden to prison for three years, with credit for time served.

¶ 4 Madden then filed a pro se motion under Crim. P. 35(c), alleging ineffective assistance of trial counsel. The trial court appointed counsel and, after

an evidentiary hearing, granted the motion and vacated Madden's conviction. The prosecution elected not to appeal the order or retry the case. Shortly thereafter, Madden requested that he no longer be required to register as a sex offender and that the court refund the costs, fees, and restitution that he had paid. Madden had paid $1,220.00 toward the costs and fees and $757.75 in restitution, for a total of $1,977.75. The trial court determined that the amount that Madden had paid toward costs and fees should be returned, so Madden received a $1,220.00 refund. The restitution money, however, had been paid to the counseling service that the victim used and could not be returned. The trial court reasoned that the counseling service could sue the victim to recover that money, and the victim should not be required to return the restitution money. Madden appealed.

¶ 5 The court of appeals reversed the trial court's decision, holding that Madden was "entitled to a refund of the restitution that he paid in connection with his vacated conviction and that he may seek such a refund from the state in the context of this case." *People v. Madden*, 2013 COA 56, ¶ 1, —— P.3d ——. The People then petitioned this court for certiorari, asking whether the trial court may order a refund of restitution. We granted certiorari to consider whether a trial court may order refunds of costs and fees,[1] in addition to restitution.[2]

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[1] The issue of whether costs and fees may be refunded was preserved at the trial court level by Madden's motion. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (explaining that an

II. Standard of Review

¶ 6 Whether a trial court has authority to order a refund of costs, fees, and restitution presents a question of law, which we review de novo. *See People v. Porter*, 2015 CO 34, ¶ 8, 348 P.3d 922, 924. This case involves issues of statutory construction, which we also review de novo. *Mishkin v. Young*, 107 P.3d 393, 396 (Colo. 2005).

III. Analysis

¶ 7 As we explain in *People v. Nelson*, which we also issue today, a trial court must have statutory authority to order a refund from public funds.[3] *See* 2015 CO 68, ¶ 1, —— P.3d ——. None of the statutes governing the costs, fees, and restitution that Madden was ordered to pay address whether the court

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issue is preserved for appeal when the trial court is "presented with an adequate opportunity to make findings of fact and conclusions of law on [the] issue").

[2] We granted certiorari to review whether the trial court may order a refund of not only restitution, but also costs and fees. See C.A.R. 3(a) ("Content of the notice of appeal is not jurisdictional."); C.A.R. 49(a) (stating that this court's review on writ of certiorari "is a matter of sound judicial discretion"). Specifically, we granted certiorari on the following issue: "Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him."

[3] As we noted in *People v. Nelson*, "any potential refund of restitution could come only from a public fund." 2015 CO 68, ¶ 40 n. 4, —— P.3d ——. Neither the court nor defendants may force victims to return money that they received as restitution under these circumstances. *Id.*

may draw on those funds. Similarly, procedural rules for defendants seeking post-conviction relief do not address whether a court may order refunds from public funds. See C.R.C.P. 60(b); Crim. P. 35(a). Moreover, sections 13–65–101 to –103, C.R.S. (2015) ("the Exoneration Act" or "the Act") "created an exclusive process for exonerated defendants seeking a refund of costs, fees, and restitution." Nelson, ¶ 44. Therefore, because the trial court did not have statutory authority to draw on public funds—outside of the procedures created in the Exoneration Act—it did not have authority to refund costs, fees, and restitution to Madden.

¶ 8 The power to collect, manage, and distribute public funds is inherently legislative, and the court may not intrude on those powers without constitutional or statutory authority. *Nelson*, ¶ 40 (citing Colo. Const. art. III); *see also People v. Dist. Ct., City & Cty. of Denver*, 808 P.2d 831, 835 (Colo. 1991) (noting that a monetary award "payable from public funds implicates sensitive budget and funding considerations, and authority to intrude into these areas is not to be lightly implied" and holding that such an award "is beyond the authority of the trial court"). For this reason, a trial court must have statutory authority to order a refund from public funds. *Nelson*, ¶ 41.

¶ 9 None of the statutes supporting the costs, fees, and restitution that Madden paid contemplate a trial court issuing refunds to defendants. Madden incurred many of the same fines as the defendant in *Nelson*, and we determined that none of the statutes governing those fees and restitution allow for a re-

fund. *See* ¶ 44 (determining that statutes governing the victim compensation fund, VAST fund, docket fees, time payment fees, and restitution do not authorize a court to order refunds from public funds).

¶ 10 Madden incurred several additional fees as well, but the statues governing these fees also do not contemplate refunding the fees to defendants. First, the court ordered Madden to pay a sex offender surcharge, which, once collected, is transmitted to the state treasurer to fund the sex offender surcharge fund. *See* § 18–21–103(2)(b), C.R.S. (2015). The General Assembly may appropriate money from this fund for the identification, evaluation, and treatment of adult sex offenders. § 16–11.7–103, C.R.S. (2015). Second, Madden was charged a special advocate surcharge. See § 24–4.2–104(1)(a)(II), C.R.S. (2003). Funds raised by this surcharge are added to the VAST fund in the judicial district where the offense occurred. *Id.* Third, Madden was charged "drug standardized assessment" and "drug testing" fees for services to monitor his substance use. See §§ 16–11.5–102, 18–1.3–209, C.R.S. (2015). Finally, he was charged a $128.00 sex offender identification fee. See § 16–11–102.4, C.R.S. (2015). Sex offender identification fees are deposited into the offender identification fund, located in the state treasury. §§ 16–11–102.4(4), 24–33.5–415.6, C.R.S. (2015). The legislature appropriates money in this fund for genetic testing of sex offenders. § 24–33.5–415.6.

¶ 11 All of these statutes governing costs, fees, and restitution explain when the fines should be imposed, how they should be collected, and how that money may be used. *See Nelson*, ¶ 39; *see also, e.g.*, §

18–1.3–209 (noting that drug standardized assessments are conducted "at the expense of the person assessed"); § 24–33.5–415.6 (describing the offender identification fund and how that money may be used). Here, Madden paid $757.75 as restitution, which was paid to the victim's counseling service; and $1,220.00 in costs and fees, which went to the victim compensation fund and the VAST fund. *See* § 16–18.5–110, C.R.S. (2015) (listing the order for crediting payments to different funds); § 24–4.2–104(1)(a)(I), C.R.S. (2015) (directing that the special advocate surcharge be deposited into the VAST fund). Because these statutes clearly state how money in these funds is to be used—and do not address the possibility of refunds—they do not permit the trial court to order a refund from these funds. *See Nelson*, ¶¶ 37–39.

¶ 12 The parties point to two procedural rules that allow a court to grant a party post-conviction relief, suggesting that these provisions authorize a court to issue refunds. *See* C.R.C.P. 60(b); Crim. P. 35(a). However, neither rule addresses the court's authority to order a refund. C.R.C.P. 60(b) permits a court to "relieve a party ... from a final judgment, order, or proceeding" under certain conditions, including:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (3) the judgment is void;

> (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (5) any other reason justifying relief from the operation of the judgment.

¶ 13 In this case, C.R.C.P. 60(b) permitted the court to hear Madden's motion seeking relief from his vacated conviction, but it did not give the court the authority to draw on public funds. The court had authority to grant Madden relief from his now-vacated conviction: the trial court released Madden from the obligation to register as a sex offender. C.R.C.P. 60(b) empowered the court to order this relief because it did not implicate "sensitive budget and funding considerations." *See Dist. Ct.*, 808 P.2d at 835. C.R.C.P. 60(b) does not, however, address a trial court's ability to order a refund, or explain how a refund might be financed. Therefore, C.R.C.P. 60(b) does not authorize a court to order a refund from public funds.

¶ 14 Next, Madden argues that Crim. P. 35(a) permits a trial court to order a refund. Crim. P. 35(a) allows a court to "correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner." As we explained in *Nelson*, money that is withheld pursuant to clear statutory authority while a conviction is in place is not wrongfully withheld. ¶ 48. Because the court had

statutory authority to order Madden to pay costs, fees, and restitution in connection with his conviction, the order was authorized by law and the fines were not imposed in an illegal manner. *Contra* Crim. P. 35(a). Therefore, Crim. P. 35(a) does not apply in this case, and it did not grant the trial court authority to order a refund from public funds.

¶ 15 Finally, we note that the Exoneration Act provides the proper procedure for seeking refunds when a defendant has been exonerated. *See* §§ 13–65–101 to –103. When we interpret multiple statutes, a specific provision prevails over a general provision. *Nelson*, ¶ 43 (citing *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168, 1174 (Colo. 1991); § 2–4–205, 1B C.R.S. (1980) (now codified at § 2–4–205, C.R.S. (2015))). Neither the statutes governing the imposition and management of costs, fees, and restitution nor the procedural rules that allow for post-conviction relief directly address whether a defendant may receive a refund. By contrast, the Exoneration Act specifically identifies a procedure and a source of funding for exonerated defendants seeking refunds of costs, fees, and restitution. § 13–65–103(2)(e)(V).

¶ 16 Therefore, when a defendant's conviction is vacated and the prosecution elects not to retry him, a trial court may only authorize a refund of costs, fees, and restitution pursuant to the process created in the Exoneration Act. Madden did not seek a refund through this process.[4] Accordingly, the trial

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[4] The Exoneration Act allowed defendants to seek relief, even if they met the criteria prior to the Act's passage, as long as they

court lacked the authority to order a refund of Madden's costs, fees, and restitution. *See Nelson*, ¶ 45.

IV. Conclusion

¶ 17 The trial court did not have the authority to grant a refund of costs, fees, and restitution to Madden. The Exoneration Act provides the only procedure for exonerated criminal defendants to seek refunds of costs, fees, and restitution. Accordingly, we reverse the court of appeals' ruling and remand the case for proceedings consistent with this opinion.

JUSTICE HOOD dissents.

JUSTICE GABRIEL does not participate.

JUSTICE HOOD, dissenting.

¶ 18 Louis Madden sought a refund of the costs, fees, and restitution he paid on account of two invalid criminal convictions. The trial court determined he was entitled to reimbursement for the costs and fees but not the restitution. The court of appeals determined he could also get back the restitution money. *People v. Madden*, 2013 COA 56, ¶ 1, —— P.3d —— —. The majority now concludes he is entitled to nothing. *See* maj. op. ¶¶ 1, 7.

¶ 19 I believe the court of appeals got it right, and I would therefore affirm that court's well-reasoned opinion authored by then-Judge Gabriel. In today's

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acted before June 5, 2015. § 13–65–102(1)(b)(II), C.R.S. (2015). Madden did not seek a refund through procedures created by the Act in the allotted two-year time frame. Therefore, we do not consider whether he met the other criteria that the Act demands, such as actual innocence.

companion case of *People v. Nelson*, 2015 CO 68, ¶ 53, —— P.3d —— (Hood, J., dissenting), I conclude that a defendant who wins reversal on direct appeal is entitled to a full refund. For the reasons I articulate in *Nelson*, I would also permit the district court to grant the same relief to Madden. Because the majority concludes the district court lacked authority to award Madden a refund, I respectfully dissent.

¶ 20 Madden's case reached us in a procedural posture distinct from *Nelson*. I do not believe this difference should matter, but I write briefly to address a contrary view.

¶ 21 A jury convicted Madden of two offenses. He appealed, and we reversed his conviction for attempting to patronize a prostituted child because the State presented no evidence that Madden took part in an exchange of value to engage in sex with a child. *See People v. Madden*, 111 P.3d 452, 454, 459–60 (Colo. 2005). Left standing was Madden's conviction for third degree sexual assault.

¶ 22 On collateral review, Madden argued that this remaining conviction was invalid because the lawyer at his trial was constitutionally ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In 2009, the district court agreed with him. Madden had "clearly shown" his counsel was deficient. Among other things, Madden's counsel solicited testimony concerning a harmful rumor about his client that was "inadmissible double or triple hearsay," allowed a police officer to testify to the alleged victim's truthfulness, and invited into the case other "extremely

damning" evidence. The court was convinced there existed a reasonable probability that, but for these errors, Madden would not have been convicted. It therefore vacated his conviction. The People did not retry him, and thus, Madden has never been validly convicted.

¶ 23 As I explained in *Nelson*, defendants are not constitutionally entitled to a direct appeal, but, when the legislature establishes such a right, defendants are entitled to due process throughout that appeal. *See Nelson*, ¶ 58 (Hood, J., dissenting). Similarly, there is no constitutional right to post-conviction review. *See People v. Wiedemer*, 852 P.2d 424, 438 (Colo. 1993) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)). Colorado nonetheless provides for collateral challenges. *See* § 18–1–410, C.R.S. (2015); Crim. P. 35. Thus, defendants have statutory rights to challenge their convictions directly and collaterally, though the procedures are quite different. *See Jurgevich v. Dist. Court*, 907 P.2d 565, 567 (Colo. 1995) ("A collateral attack ... does not invoke the same rights as a direct appeal." (citing *Wright v. West*, 505 U.S. 277, 287–93, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (plurality opinion))). But whichever procedural road a defendant travels, I fail to see why the State is entitled to retain the funds paid by a defendant who ultimately shows his conviction is invalid.

¶ 24 I acknowledge at least one court has seen fit to draw a distinction between the relief available following a reversal on direct appeal and following a collateral invalidation of a conviction. *See United States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir.

2004). I am not persuaded by the Ninth Circuit's reasoning. In *Hayes*, a defendant won post-conviction relief because of a Sixth Amendment violation, and the government elected not to retry him. *Id.* at 1227–28. Hayes then sought a refund from the United States for the payments he made while subject to his invalid criminal conviction. *Id.* at 1228. The panel, citing *Telink, Inc. v. United States*, 24 F.3d 42, 46–47 (9th Cir. 1994), agreed he could be reimbursed for costs and special assessments, but it concluded that, in the post-conviction context, a refund of restitution depends on whether and when the government disbursed the funds. *See Hayes*, 385 F.3d at 1229–30. The court concluded that even an invalidly convicted defendant cannot recover from the government money it no longer has so long as the government waited until the conviction was final before disbursing the money. *Id.* at 1230. The Ninth Circuit compared the government's role to that of an escrow agent, and it rejected the defendant's view that the government must not disburse any funds before a defendant exhausts his collateral challenges. *See id.* at 1230 & n.6. By granting Madden a refund of his costs and fees while denying him a restitution refund, the trial court in this case effectively arrived at the same result.

¶ 25 While I agree the government has a legitimate interest in effectuating its system of restitution payments for crime victims—among the legislatively declared purposes of the system is the "expeditious" collection and "timely" distribution of compensation, § 18-1.3-601(1)(g)(I)–(II), C.R.S. (2015)—I find the Ninth Circuit's escrow analogy inapt, at least for the

situation here. The State is not required to sit on the restitution money of all defendants through collateral or direct review; it must only reimburse those defendants who are never validly convicted. The legislature is free to determine the best means of providing for these refunds. *See Nelson*, ¶ 79 (Hood, J., dissenting).

¶ 26 Moreover, a distinction between direct and collateral review would devalue certain constitutional rights purely on the basis of which procedural tool a defendant used to vindicate them. For example, a defendant who suffered a Fourth Amendment violation could receive a full refund if he sought direct review of his suppression motion, while a defendant who suffered a Sixth Amendment violation could not receive a full refund if he sought review through a collateral challenge. Madden used the collateral process and demonstrated that his conviction was obtained in violation of the Sixth Amendment. He too should be placed in the status quo ante. As this court has previously remarked, "[U]nconstitutional convictions, in addition to being of suspect reliability, abridge the very charter from which the government draws its authority to prosecute anyone." *People v. Germany*, 674 P.2d 345, 349 (Colo. 1983).

¶ 27 Thus, I conclude Madden is just as entitled to a refund of his costs, fees, and restitution as a defendant winning reversal on direct appeal. For the reasons given in my dissent in *Nelson*, I therefore respectfully dissent.

APPENDIX C

Colorado Court of Appeals, Div. VI

The PEOPLE of the State of Colorado, Plaintiff–Appellee,
v.
Shannon NELSON, Defendant–Appellant.

Court of Appeals No. 11CA1206
Announced April 25, 2013
Rehearing Denied June 6, 2013

Opinion by JUDGE GABRIEL

¶ 1 Defendant, Shannon Nelson, formerly known as Shannon Gonser, appeals from the district court's order denying her motion for a refund of the restitution paid while she was incarcerated in the Department of Corrections (DOC). Addressing an apparent matter of first impression in Colorado, we hold that a defendant whose conviction is overturned on appeal is entitled to seek a refund of the restitution paid in connection with the overturned conviction when the People fail to prove on remand the defendant's guilt of the charged crimes beyond a reasonable doubt (e.g., due to a subsequent acquittal or a decision not to retry the defendant). We further conclude, also as a matter of first impression, that such a defendant may seek the refund of restitution from the state in his or her criminal case without having to file a separate proceeding.

¶ 2 Accordingly, we reverse the district court's order and remand for further proceedings.

I. Background

¶ 3 Nelson was charged with forty counts related to the alleged sexual assault and physical abuse of her four children. Following a jury trial, she was convicted on five counts and sentenced to the DOC. The district court also ordered Nelson to pay restitution, court costs, and fees totaling $8192.50, of which $7845 was for restitution.

¶ 4 As pertinent here, the DOC subsequently withheld $681.35 from Nelson's inmate account and applied that sum toward the restitution, fees, and costs. The breakdown contained in Nelson's opening brief indicating how this sum was allocated does not total $681.35, but Nelson asserts that $390.67 of the total amount withheld was applied to the restitution owed.

¶ 5 Nelson appealed her convictions, and a division of this court reversed and remanded for a new trial. *People v. Gonser*, (Colo. App. No. 06CA1023, Apr. 9, 2009) 2009 WL 952492 (not published pursuant to C.A.R. 35(f)). At her second trial, Nelson was acquitted of all of the remaining charges.

¶ 6 Thereafter, Nelson moved for a refund of the restitution, fees, and costs that she paid while in the DOC. The district court, however, concluded that it lacked the authority to order such a refund and denied the motion.

¶ 7 Nelson now appeals.

II. Discussion

¶ 8 Nelson contends that the district court erred in concluding that it lacked the authority to order a refund of the restitution, fees, and costs that Nelson paid in connection with a conviction that was overturned when she was acquitted after retrial of all of the remaining charges against her. We agree that the district court erred.

A. Standard of Review

¶ 9 The question of whether the district court had the authority to order a refund of the restitution, fees, and costs that Nelson paid presents a question of law that we review de novo. *See People v. Pino*, 262 P.3d 938, 940 (Colo. App.2011).

B. Refund of Restitution, Fees, and Costs

¶ 10 The General Assembly has expressed its intent that restitution be awarded to crime victims. § 18–1.3–601(2), C.R.S.2012. Thus, every order of conviction of a felony, among other crimes, shall include consideration of restitution. § 18–1.3–603(1), C.R.S.2012.

¶ 11 When restitution may be awarded, the prosecution must prove the amount of restitution owed by a preponderance of the evidence. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). Because of the lower burden of proof for restitution than for a conviction, restitution may be awarded in connection with a criminal conviction for related but uncharged conduct. *Id.* at 731. Similarly, a division of this court has held that when a conviction is abated by operation of law due to the defendant's death, a restitution order issued in connection with that conviction need

not also be abated. *People v. Daly*, —— P.3d ——, —— (Colo. App. No. 10CA0580, June 9, 2011).

¶ 12 As the foregoing authorities make clear, restitution must be tied to a valid conviction, even if the amount is based on uncharged conduct that is related to the conduct on which the conviction was based. *See also People v. Brigner*, 978 P.2d 163, 164 (Colo. App. 1999) (noting that a defendant may not be ordered to pay restitution for losses that did not result from the conduct that was the basis of his or her criminal conviction). Thus, a division of this court has indicated that when a conviction is reversed and a case is remanded for a new trial, any restitution order imposed in connection with the conviction must be vacated, pending the outcome of the new trial. *See People v. Scearce*, 87 P.3d 228, 235 (Colo. App. 2003) (vacating a restitution order in connection with the reversal of a conviction on appeal).

¶ 13 Similarly, fees and costs imposed on a defendant must be tied to a valid conviction. *See* § 13–32–105, C.R.S.2012 (providing for a docket fee and surcharge to be assessed and collected from a defendant upon his or her conviction); § 16–18–101(1), C.R.S.2012 (providing that the costs in a criminal case shall be paid by the state when the defendant is acquitted); § 24–4.1–119(1)(a), C.R.S.2012 (providing for, among other things, costs to be levied against a defendant on each criminal action resulting in a felony conviction); § 24–4.2–104(1)(a)(I), C.R.S.2012 (providing for, among other things, a surcharge to be levied against a defendant on each criminal action resulting in a felony conviction).

¶ 14 Applying these principles here mandates that the restitution, fees, and costs imposed on Nelson in connection with her overturned conviction be vacated, because there is no valid conviction to which any such restitution, fees, and costs may be tied. The question thus becomes whether Nelson is entitled to seek, and the district court is authorized to award, a refund of the restitution, fees, and costs that Nelson has already paid.

¶ 15 With respect to the fees and costs, our supreme court has held that when a conviction is vacated, the parties should be "placed in *status quo* by refund to the defendant of the sums paid as fine and costs." *Toland v. Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961); *cf. People v. Noel*, 134 P.3d 484, 487 (Colo. App. 2005) (distinguishing *Toland* on the ground that it did not involve probation supervision fees and concluding that, because the purpose of probation is primarily rehabilitative, and because the defendant could have benefited from the services that she received and paid for, the district court did not err in denying the defendant's motion for a refund of the probation supervision fee). The People cite no authority contrary to *Toland*, and we are aware of none.

¶ 16 Accordingly, we conclude that Nelson was entitled to seek, and the district court was authorized to award, a refund of the fees and costs that Nelson paid in connection with her now overturned conviction.

¶ 17 With respect to restitution, although no published Colorado appellate decisions appear to have

addressed the question of whether a defendant in Nelson's position may seek a refund of the restitution previously paid, courts in other jurisdictions have done so. For example, in *Telink, Inc. v. United States*, 24 F.3d 42, 46 (9th Cir. 1994), the court rejected the argument that a petitioner who had filed a successful writ of error from a judgment was required to file a Tucker Act claim to recover fines or restitution stemming from a wrongful conviction. Rather, on the facts before it, which involved only fines and not restitution, the court agreed that the recovery of wrongly paid fines is incident to the vacating and setting aside of a wrongful conviction. *Id.* at 46–47. Thus, the court held that if the defendants were to prevail in setting aside their convictions, then the wrongly paid fines would be "automatically refunded" without requiring a civil action. *Id.* at 47.

¶ 18 Similarly, in *United States v. Beckner*, 16 F. Supp. 2d 677, 679 (M.D. La.1998), the court rejected the government's argument that because it had already disbursed the restitution funds, it should not be required to repay the defendant, observing, "The government offers neither logic nor authority to support this argument." The court thus held, "[T]his court has jurisdiction to carry out its obligation to completely vacate all aspects of the erroneous [judgment] issued by it." *Id.*

¶ 19 Finally, in *United States v. Venneri*, 782 F. Supp. 1091, 1093 (D. Md. 1991), the court observed, as pertinent here, that there is always a means for a person to recoup his or her losses when the loss takes the form of a monetary fine. The court added, "The interests of justice make it imperative that the

petitioner receive a refund of his restitution." *Id.* The court then proceeded to hold that the wrongfully convicted defendant was entitled to recover from a third party the restitution paid to that third party as a consequence of the defendant's unconstitutional conviction. *Id.* at 1094. In so holding, the court stated, "[P]rinciples of justice require no less than a full refund of that money." *Id.* at 1094–95; *see also United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled. Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines."). *But see United States v. Hayes*, 385 F.3d 1226, 1228–30 (9th Cir. 2004) (concluding that a defendant was not entitled to a refund of restitution when his conviction was affirmed on appeal, he ultimately filed a successful habeas corpus petition, and the government chose not to retry him, because the government had merely served as an escrow agent pending the final judgment, had paid the funds over to the victims at the proper time, and, thus, had acted properly).

¶ 20 We are persuaded by the reasoning of those cases in which courts have allowed a defendant to seek a refund of the restitution paid in connection with a conviction that is subsequently overturned either through an appellate reversal and a subsequent acquittal or through an appellate reversal and an ultimate decision not to prosecute or a dismissal

by the prosecution. In such cases, the state will have failed to prove that the defendant is guilty of the charged crimes beyond a reasonable doubt (which distinguishes such cases from a case like *Daly*, in which the conviction was abated only by operation of law and through no action of the prosecution).

¶ 21 Accordingly, we conclude that in addition to her right to seek a refund of the fees and costs that she paid, Nelson is entitled to seek, and the district court is authorized to award, a refund of the restitution that Nelson paid in connection with her overturned conviction.

C. Means of Obtaining Refund

¶ 22 Having so determined, we must address the mechanism by which Nelson may seek such a refund.

¶ 23 Although we have found no published Colorado appellate decisions directly on point, courts in other jurisdictions have concluded that a defendant who pays fines or restitution based on a conviction that is later set aside may seek a refund in the pending criminal case without having to file a separate civil action. *See, e.g., Telink*, 24 F.3d at 47 (noting that if the defendants prevail in setting aside their convictions, then "the wrongly paid fines would be automatically refunded, without requiring a civil action"); *Lewis*, 478 F.2d at 836 (discerning no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled, and not-

ing that the district court was empowered to require the repayment of the fines); *Cooper v. Gordon*, 389 So.2d 318, 319 (Fla. Dist. Ct. App. 1980) (holding that the district court had jurisdiction to entertain the defendant's motion for a refund of the fines, costs, and restitution that he paid before his conviction was reversed); *see also United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) (noting that property seized in a criminal proceeding may ultimately be disposed of by the court in that proceeding or in a subsequent civil action but stating, "It makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case."). *But see State v. Peterson*, 153 Idaho 157, 280 P.3d 184, 194 (Idaho Ct. App. 2012) (concluding that the district court lacked subject matter jurisdiction to grant a refund motion and that even if the court had such jurisdiction, it lacked personal jurisdiction over the nonparty agencies that collected, disbursed, or retained the amounts paid).

¶ 24 Although not directly on point, the division's decision in *People v. Hargrave*, 179 P.3d 226 (Colo. App. 2007), is instructive. In *Hargrave*, the division concluded that the district court in a criminal proceeding had ancillary jurisdiction, or inherent power, to entertain the defendant's post-sentence motion for the return of seized property. *Id.* at 230. Specifically, the division quoted with approval a case from the United States Court of Appeals for the District of Columbia Circuit, which stated that a court may exercise ancillary jurisdiction when:

> "(1) the ancillary matter arises from the same transaction which was the basis of the

> main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated."

Id. at 229–30 (quoting *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969)); *see also Yording v. Walker*, 683 P.2d 788, 791 (Colo. 1984) (concluding that the district court erred in holding that it lacked the authority to order a refund of some or all of the premium payment that the defendant had made to a surety as a result of the court's erroneous grant of bail).

¶ 25 We are persuaded by the reasoning in *Hargrave* and the above-described cases that hold that a defendant may seek a refund by filing a motion in his or her criminal case. Specifically, here, (1) Nelson's refund petition arose from the same transaction that was the basis of the main proceeding; (2) her petition could be determined without a substantial new factfinding proceeding; (3) deciding her refund petition would not deprive any party of a substantial procedural or substantive right; and (4) in our view, Nelson's refund petition must be settled to ensure that the disposition of the underlying crimi-

nal proceeding will not be frustrated. *See Hargrave*, 179 P.3d at 229–30.

¶ 26 Moreover, we conclude that judicial economy will better be served by allowing the matter of the restitution, fees, and costs to be resolved in the criminal proceeding by the court that tried the case, even if the criminal case has been concluded. *See Wilson*, 540 F.2d at 1104. And such a result is consistent with Crim. P. 57(b), which provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists.

¶ 27 We are not persuaded otherwise by the People's assertion that Nelson's request for a refund of restitution, fees, and costs amounts to an improper challenge to the DOC's management of inmates. The cases on which the People rely do not involve efforts to recover restitution, fees, or costs paid in connection with a subsequently overturned conviction. Rather, those cases involved challenges to the DOC's actions in enforcing orders for the payment of restitution, fees, and costs where, unlike here, the defendant's conviction had not been overturned. *See, e.g., People v. Carrillo*, 70 P.3d 529, 530–31 (Colo. App. 2002) (noting that the defendant's claims, which asserted that the DOC's practice of withhold-

ing restitution funds from his inmate account was illegal and unconstitutional, were not cognizable under Crim. P. 35(a) or 35(c)); *Jones v. Colo. Dep't of Corr.*, 53 P.3d 1187, 1191 (Colo. App. 2002) (concluding, among other things, that the district court lacked jurisdiction over the defendant's purported C.R.C.P. 106(a)(4) action demanding the return of restitution funds withheld from his inmate account, because the inmate was not challenging a judicial or quasi-judicial action of the DOC).

¶ 28 In reaching our conclusion here, we are not unmindful of the fact that in certain cases, the state may be required to refund monies that it has already disbursed to third parties (i.e., people and entities not controlled by the state). For several reasons, however, we believe that such a result is reasonable and appropriate.

¶ 29 First, it was the state's action that ultimately resulted in the wrongful payment of restitution.

¶ 30 Second, when the state chose to disburse the funds, it necessarily assumed the risk that the conviction could ultimately be overturned.

¶ 31 Third, we do not believe it appropriate to create a scenario in which former criminal defendants are left to seek out and file lawsuits or other proceedings against third parties, and especially crime victims, to recover the restitution amounts that the defendants previously paid.

¶ 32 Fourth, when a former defendant seeks a refund from the state, there is nothing to preclude the state, in its discretion, from seeking to recover such

restitution amounts from the third parties, and we view this as a more palatable option, given that the state would have had prior dealings with the victims and any service providers. In addition, the state would be in the best position to assess whether the amount of the restitution at issue or the impact on the victims or service providers justifies any effort to recover such funds.

¶ 33 Finally, in a situation like that present here, where either the former defendant or the state must bear the risk of a wrongly paid restitution award, we believe that the risk should rest with the state, which collected the restitution funds but then ultimately failed to prove its case and which would likely be better able to bear the risk.

¶ 34 In so holding, we note that this case has come to us with little case law or legislative guidance to assist us. Nonetheless, it was incumbent on us to decide the appropriate remedy here, and we have done so in a way that we believe is warranted and appropriate on the facts presented and existing law. We recognize, however, that cases like this present a myriad of issues, some of which appear to implicate difficult questions of public policy. Accordingly, we encourage the General Assembly to consider the questions presented in this case and in *People v. Madden*, 2013 COA 56, —— P.3d ——, which we are also deciding today.

¶ 35 In light of our foregoing disposition, we need not address Nelson's assertion that the denial of her motion for a refund of restitution violates certain of her federal and state constitutional rights.

III. Conclusion and Remand Order

¶ 36 For these reasons, the order is reversed, and the case is remanded to the district court to consider on the merits Nelson's motion for a refund of the restitution that she paid.

JUDGE LOEB and JUDGE VOGT* concur.

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S. 2012.

APPENDIX D

Colorado Court of Appeals, Div. VI

The PEOPLE of the State of Colorado, Plaintiff–Appellee,

v.

Louis MADDEN, Defendant–Appellant

Court of Appeals No. 09CA2081
Announced April 25, 2013
Rehearing Denied June 6, 2013

ORDER REVERSED AND CASE REMANDED WITH DIRECTIONS

Opinion by JUDGE GABRIEL

¶ 1 Defendant, Louis Madden, appeals the district court's order denying his request for a refund of restitution. For the reasons set forth in *People v. Nelson*, 2013 COA 58, —— P.3d ——, which we also decide today, we conclude that Madden is entitled to a refund of the restitution that he paid in connection with his vacated conviction and that he may seek such a refund from the state in the context of this case. Accordingly, we reverse and remand for further proceedings.

I. Background

¶ 2 Madden was convicted of attempted patronizing a prostituted child and attempted third degree sexual assault by force, and he was ordered to pay restitution in the amount of $910. The supreme

court ultimately reversed the conviction for attempted patronizing a prostituted child but upheld the attempted third degree sexual assault conviction. *People v. Madden*, 111 P.3d 452, 459 (Colo. 2005).

¶ 3 Thereafter, Madden sought relief pursuant to Crim. P. 35(c), arguing that his trial counsel was constitutionally ineffective. The postconviction court granted Madden's motion, vacated his remaining conviction, and ordered the prosecution to advise the court within thirty days whether it intended to retry Madden. The prosecution advised the court that it would not appeal the postconviction court's order or retry the case.

¶ 4 Madden then moved for a refund of the fees and costs, including the restitution, that he paid pursuant to his now vacated conviction. The postconviction court conducted a hearing on this motion and ordered a refund of all monies paid except for the restitution. Although the court expressly recognized that there was no longer any conviction, it stated that it could not see requiring the victim to have to pay anything back just because Madden's attorney was ineffective. In the court's view, "[i]t wasn't anything that [the victim] did wrong."

¶ 5 Madden now appeals.

II. Discussion

¶ 6 In *Nelson*, ¶ 1, decided today, we held that a defendant whose conviction is overturned on appeal is entitled to seek a refund of the restitution paid in connection with the overturned conviction when the People fail to prove on remand the defendant's guilt

of the charged crimes beyond a reasonable doubt (e.g., due to a subsequent acquittal or a decision not to retry the defendant). We further held that such a defendant may seek the refund of restitution from the state in his or her criminal case without having to file a separate proceeding. *Id.*

¶ 7 Applying that reasoning here, we conclude that Madden is entitled to a refund of the restitution that he paid in connection with his now overturned conviction and that he may seek a refund by filing a motion in this case.

¶ 8 In reaching this conclusion, we acknowledge that at least one court has held that a refund of restitution is inappropriate when a conviction was affirmed on direct appeal but all remaining charges were later dismissed in the context of a collateral attack on that conviction. Specifically, in *United States v. Hayes*, 385 F.3d 1226, 1228 (9th Cir. 2004), the defendant was convicted, and his conviction was affirmed on appeal, but he ultimately filed a successful habeas corpus petition, which resulted in an order vacating his conviction and requiring a new trial. The government, however, chose not to retry the defendant and dismissed the case, and the defendant filed a motion for a refund of the restitution, special assessments, and costs that he had paid. *Id.* The court granted the motion as to the special assessments and costs but denied it as to the restitution. *Id.* at 1230. With respect to the restitution, the court concluded that if the government retained restitution funds paid by the defendant until his or her conviction became final and then distributed those funds to the victims, then the defendant has no right

to recover such sums from the government. *Id.* The court reasoned that in such cases, the government merely served as an escrow agent pending the final judgment and at the proper time paid the funds over to the victims. *Id.* The court further observed that the government acted properly in holding the restitution funds until the conviction became final. *Id.*

¶ 9 We are not persuaded that we should adopt a rule that so distinguishes between cases in which a defendant is retried and acquitted after a reversal on appeal and those in which a conviction is ultimately nullified in the context of a collateral attack on that conviction. Such a distinction would rest the pertinent inquiry on whether the state had acted wrongfully. In our view, however, the proper focus should be on returning the defendant to the status quo ante. *See Cooper v. Gordon*, 389 So.2d 318, 319 (Fla. Dist. Ct. App. 1980) (holding that on reversal and remand for a new trial, the district court retained the inherent power "to correct the effects of its own wrongdoing and restore the petitioner to the status quo ante," and thus further holding that the district court had jurisdiction to entertain the defendant's motion for a refund of the fines, costs, and restitution that he paid before his conviction was reversed); *see also Toland v. Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961) (noting, in the context of a motion for a refund of fees and costs, that when a conviction is vacated, the parties should be returned to the status quo by allowing such a refund). In this regard, we agree with the court's statement in *United States v. Venneri*, 782 F. Supp. 1091, 1093 (D. Md. 1991), that in a case such as this, "[t]he interests of

justice make it imperative that the [defendant] receive a refund of his restitution."

¶ 10 We likewise are not persuaded by the People's assertion that because Madden was never exonerated, this case is analogous to the division's decision in *People v. Daly*, — P.3d ——, —— (Colo. App. No. 10CA0580, June 9, 2011). In *Daly*, the defendant's conviction was abated by operation of law when the defendant died while his appeal was pending. *Id.* at ——. Accordingly, in that case, the prosecution had proved the defendant's guilt beyond a reasonable doubt, and that judgment was never reviewed or overturned on its merits by an appellate court. Indeed, due to the defendant's death, the prosecution was deprived of the opportunity to defend its judgment on appeal, and the judgment was abated through no actions of the prosecution. *Id.* at ——.

¶ 11 Here, in contrast, Madden's conviction was vacated in postconviction proceedings, and the prosecution chose not to appeal the postconviction order or to retry the case. Thus, the prosecution did not ultimately prove Madden's guilt beyond a reasonable doubt, and as a result, there is no conviction to which restitution could properly be tied. *See Nelson*, ¶ 12 (noting that restitution must be tied to a valid conviction). In these circumstances, we conclude that the restitution order cannot stand. *See id.* Indeed, to hold otherwise would allow a prosecutor to preserve an unfounded restitution award merely by choosing not to retry a case in which the judgment was invalidated on appeal or in postconviction proceedings,

subject to retrial. In our view, such a scenario would be absurd, and, thus, we cannot countenance it.

¶ 12 Accordingly, we conclude that Madden is entitled to a refund of the restitution that he paid in connection with his now overturned conviction. We again note, however, as we did in *Nelson*, ¶ 34, that the issues presented in this case may well lend themselves to legislative action, and we encourage the General Assembly to consider these issues.

III. Conclusion and Remand Order

¶ 13 For these reasons, the order is reversed, and the case is remanded to the district court to award Madden a refund of the restitution that he paid in this case.

JUDGE LOEB and JUDGE VOGT* concur.

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S.2012.

APPENDIX E

District Court, County of Arapahoe
State of Colorado

The People of the State of Colorado
v.
Shannon Gonser

Case No. 05 CR 2119
May 5, 2011

The hearing in the matter commenced on Thursday, May 5, 2011, before the Honorable Marilyn Leonard Antrim, Judge of the District Court.

PROCEEDINGS

(The following proceedings were conducted in open court and entered of record:)

THE COURT: 2004 CR 652, Shannon Gonser, Shannon Nelson.

MR. DAWSON: Gary Dawson for the People.

MR. STUART: Martin Stuart on behalf of Ms. Nelson.

THE COURT: Ms. Nelson is not here. She is not on bond.

MR. STUART: She is in college and had a final today.

THE COURT: Well, that's more important than this, I think.

All right. You filed a motion, Mr. Stuart, and that's for a return of the restitution payments because she wasn't convicted.

What's your thinking, Mr. Dawson?

MR. DAWSON: Judge, my position is that what counsel is suggesting makes sense, however there is no statutory or appellate authority that authorizes it.

There is statutes of that cited in his motion, the authority for the Court to grant restitution.

There is, unfortunately, not a mechanism to reverse that. In essence, the Court has much authority to direct victim comp to return that money as to direct counsel to get that restitution for the first five people he sees outside the courtroom. There is just not a mechanism for this to take place, and to amplify, the Court is a creature of statute. A lot of things make sense that are constrained by statute, and he also cites to the constitution and a Court's inherent authority, however that is usually—I don't know—strained or directed by a statute. For example—

THE COURT: I get your point, Mr. Dawson.

MR. DAWSON: Thank you, Judge.

THE COURT: Thank you.

Well, Mr. Stuart, how do I have the authority to order that the victims return this money?

MR. STUART: Judge, I don't think you have the authority to order victims to return the money, but you certainly have the authority to order the Prosecution to do it.

I think the authority that I state in the motion is clear that if—I mean, if the Court doesn't have the authority to return money that was wrongfully taken from a person, then what authority does that Court have?

THE COURT: All right. Let me stop you here.

At the time that money was taken, it was not wrongfully taken, because Ms. Nelson had been convicted at that time.

Later, the Court of Appeals overturned the conviction, and at a second trial she was found not guilty of the first three or four counts that she was convicted of at the first trial. So it's not wrongfully taken. It was legally taken at the time because of the conviction, which was later overturned.

It was never given to the District Attorney, so far as I know.

Was it given to your office, Mr. Dawson?

MR. DAWSON: No, Judge. I don't think our office has it even cited in his motion as a party for that.

MR. STUART: Money was taken from Ms. Nelson's accounts at DOC.

THE COURT: Right, and given to the children. I would assume to the children for their therapy. It may have been given to the victim witness or Victims Compensation because they paid for the therapy.

MR. STUART: Which is run by the District Attorney's Office.

THE COURT: Well, I see your point. DOC was less than forthcoming when I asked them where the money went. All they would provide us with was a number of—the amount of money that they took from Ms. Nelson's account.

THE COURT: What amount is that again?

MR. STUART: $681.35.

THE COURT: I appreciate your position, Mr. Stuart, and I can certainly understand why Ms. Nelson wants the money returned.

In my opinion, I have no authority to do that, and so, I am denying your motion, and you are free to take this up on an appeal. It's an interesting issue.

MR. STUART: And we will.

THE COURT: All right.

(Whereupon, the hearing was adjourned.)

APPENDIX F

District Court, La Plata County
State of Colorado

People of the State of Colorado
v.
Louis Alonzo Madden

Case No. 00CR76
August 13, 2009

TRANSCRIPT OF PROCEEDINGS

Proceedings in the matter were held on August 13, 2009, before the Honorable Jeffrey R. Wilson, District Judge, in Durango, Colorado.

....

THE COURT: All right, 00CR76. This was in regard to the moneys that he's paid on the conviction that I vacated.

MR. WILLIAMSON: Right.

THE COURT: And I had the research attorneys do a little research for me, kind of looks like I can do whatever I feel like.

Any position, Mr. Risberg?

MR. RISBERG: Judge, I think that's between the Court and Mr. Madden.

THE COURT: Okay. Anything you want to say, Mr. Williamson?

MR. WILLIAMSON: Well, Judge, I believe that the only authority under restitution orders, 18-1.3-603, and judgment for cost of fines, 18-1.3-701, is if there's a conviction. And as a result of the 35(c) and the fact that the prosecution is not going to prosecute, there is no conviction, so I don't think there's any statutory authority to impose any fines, fees or restitution and they should be—

THE COURT: Is there any statutory authority for me to give it back?

MR. WILLIAMSON: I don't believe I'm aware of that. I didn't do as much research as I could, and I don't think we're going to end up with any law on that.

THE COURT: I don't think you are either. I mean, I had them look and there wasn't any.

MR. WILLIAMSON: And I wanted to cite, just briefly, due process and protections against double jeopardy, although due process is the main issue. Colorado Constitution, Article II, Section 16-25-18, and US Amendment 5 and 14. And then double jeopardy also within the US and Colorado Constitutions.

THE COURT: Okay. Well, I'm going to order that everything be returned except for the restitution that was paid.

I just—just because I vacated the conviction—that's one thing, but I just can't see requiring the charged victim to have to pay anything back on this whole situation because your attorney was ineffective. It wasn't anything that she did wrong. I don't have a problem ordering everything else being returned. And I'm not sure how that broke out in

terms of how much is which, but I know my clerks will figure that out.

THE DEFENDANT: Your Honor, the only point I would make is that the restitution amount wasn't paid to the victim directly, it was paid to a counseling service.

THE COURT: Right. And they would go after the victim or victim's comp, if they paid for that, which probably—would have the option to go after the victim in terms of getting the money. I don't know that they would, they would have that option.

And you can certainly appeal me. I don't think there's any law on it and I might be wrong, and if I am, the court of appeals can tell me that and order me what to do. Okay?

MR. WILLIAMSON: Okay.

....

THE COURT: Yeah, I'm ordering everything come back except for this $757.75, that's the amount that would not come back, Mr. Madden. Just so you know what that is.

THE DEFENDANT: Yes, Your Honor.

....

APPENDIX G

Colorado Supreme Court

The People of the State of Colorado
v.
Shannon Nelson

Supreme Court Case No.: 2013SC495
February 8, 2016

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 8, 2016.

JUSTICE HOOD would grant the petition

JUSTICE GABRIEL does not participate

APPENDIX H

Colorado Supreme Court

The People of the State of Colorado
v.
Louis Alonzo Madden

Supreme Court Case No.: 2013SC496
February 8, 2016

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 8, 2016.

JUSTICE HOOD would grant the petition

JUSTICE GABRIEL does not participate

Supreme Court, U.S.
FILED
AUG - 9 2016
OFFICE OF THE CLERK

No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,
Petitioners,

v.

COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

BRIEF IN OPPOSITION FOR THE STATE OF COLORADO

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QUESTION PRESENTED

The Colorado Supreme Court held that state courts lack statutory authority to require a refund of court costs, fees, or restitution when a defendant's conviction is overturned on appeal. The court concluded that Colorado's Exoneration Act is the only source of statutory authority for a defendant in Petitioners' position to obtain reimbursement of costs, fees, and restitution. Petitioners have not sought relief under the Act and did not challenge its constitutionality below.

The question presented is:

Should this Court grant certiorari to review the constitutionality of a state law statutory procedure that has never been directly challenged?

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STATEMENT OF THE CASE

I. Petitioner Nelson

Trial, appeal, and retrial. Nelson was charged with forty counts of sexual assault against her four minor children. Pet. App. 51a. The jury convicted her on five counts. *Id.* The court sentenced Nelson to a prison term and—as is required by statute—ordered her to pay court costs, fees, and restitution. *Id.* The purpose of the restitution order was to pay for mental health therapy for the children. *Id.* at 72a. Nelson did not contest the restitution order, and while she was incarcerated, the Department of Corrections withheld approximately $700 from her inmate account to be used toward these payments. *Id.* at 51a.

On direct appeal of Nelson's conviction, the Colorado Court of Appeals reversed and remanded for a new trial because the trial court had allowed the prosecution to call an unendorsed expert witness. *People v. Gonser*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009) (unpublished). On retrial, the jury acquitted Nelson on all counts. Pet. App. 51a.

Request for return of funds. Following her acquittal, Nelson filed a motion in her criminal case asking for return of the funds withheld from her inmate account. *Id.* The motion included a single sentence mentioning due process. It argued primarily that return of the funds was required by state statutes.

The court held a hearing, at which Nelson's counsel conceded that the court had no authority to order victims to return restitution funds. *Id.* at 71a. He argued instead that the prosecutor should be ordered to refund the money. *Id.* There was no mention of due

process. The trial court rejected Nelson's argument, concluding that none of the funds had been "wrongfully taken" because at the time they were withdrawn from her inmate account, Nelson had been convicted and her conviction not yet reversed. *Id.* at 72a. The court found that the restitution funds had already been disbursed to pay for the children's mental health therapy and held that it lacked authority to order the prosecution or the Colorado Department of Corrections to refund the money. *Id.* at 73a.

Colorado Court of Appeals decision. The court of appeals reversed, holding that a defendant whose conviction is overturned on appeal is entitled to seek a refund in the trial court when there is a subsequent acquittal or a decision not to retry the defendant. *Id.* at 50a. The court concluded that any order for restitution, fees, and costs must be vacated when a conviction is overturned because "there is no valid conviction to which any such restitution, fees, and costs may be tied." *Id.* at 54a. Although the court acknowledged that its decision implicated public policy issues within the province of the legislature, it nonetheless remanded the case for the trial court to "consider on the merits" defendant's motion for a refund of the restitution she had paid. *Id.* at 62a–63a.

Colorado Supreme Court decision. The Colorado Supreme Court reversed, holding that the trial court had no statutory authority to issue a refund of restitution, costs, or fees. *Id.* at 1a. The court concluded that a defendant can seek return of those payments through a petition under Colorado's Exoneration Act, but noted that because Nelson did not file such a petition, the Act "does not apply to this case." *Id.* at

12a. The majority reasoned that—just as courts must follow statutory commands in imposing and disbursing fees—courts may authorize refunds from public funds only pursuant to statutory authority. *Id.* at 17a. Only the Exoneration Act specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution. *Id.* at 20a. To recover under the Act, a defendant must prove that she was "actually innocent" of the charged crime, which means she "must show either that her conviction was the result of a miscarriage of justice or that she is factually innocent." *Id.* at 12a.

One justice dissented, arguing that the court of appeals was correct and that a trial court had authority to order a refund through its "ancillary jurisdiction." *Id.* at 30a. He contended that the Exoneration Act does not provide sufficient process for defendants in Nelson's situation because it (1) puts the burden on the petitioner to prove her actual innocence by clear and convincing evidence, (2) is not geared toward refunds, but to compensation for wrongful incarceration, and (3) is impractical for seeking small refunds if defendants must retain a lawyer. *Id.* at 28a–29a.

In response to the dissent, the majority concluded that requiring a defendant in Nelson's position to seek a refund through the civil process created by the legislature, rather than by motion in the criminal court, does not violate due process. *Id.* at 20a–22a.

II. Petitioner Madden

Trial, appeal, and postconviction proceedings. Madden was charged with attempted patronizing of a prostituted child and attempted sexual assault. The charges were based on allegations that he propositioned a 14-year-old girl who was a passenger on the trolley he was driving, then pinned her against a window and masturbated on her stomach. PR. Tr. 7/23/01 pp. 189–200; Tr. 7/24/01, pp. 216–17; Tr. 7/25/01, pp. 500–01. He was convicted and initially given an indeterminate sentence, as well as ordered to make restitution payments to cover the victim's mental health therapy expenses. Pet. App. 37a. Madden did not challenge the restitution order and paid approximately $2,000 in fees and restitution. *Id.* at 37a–38a.

On direct appeal, the court of appeals affirmed the conviction for attempted patronizing but reversed the attempted sexual assault conviction. *People v. Madden*, 87 P.3d 153 (Colo. App. 2003). The Colorado Supreme Court came to the opposite conclusion, affirming Madden's attempted sexual assault conviction but reversing as to the attempted patronizing count. *People v. Madden*, 111 P.3d 452 (Colo. 2005). On remand, the trial court imposed a three-year prison sentence with credit for time served. Pet. App. 37a.

Madden then filed a *pro se* postconviction motion, alleging ineffective assistance of trial counsel. The trial court granted the motion because Madden's attorney failed to object to inadmissible evidence and injected evidence of Madden's guilt into the trial. PR. CF, vol. 2, pp. 296–305, 337–42. The district attorney elected not to appeal the order or retry the case. Pet. App. 37a.

Motion for return of funds. Madden requested a refund of the approximately $2,000 in costs, fees, and restitution that he had paid. *Id.* at 38a. The trial court ordered that the costs and fees be refunded, but denied the motion as to restitution. *Id.* at 75a. The court expressed concern that the counseling service that received the restitution payments, if required to reimburse Madden, would sue the victim or the victim compensation board for payment. The court considered this to be an unjust result where Madden's conviction was only reversed because his attorney had been ineffective. *Id.* at 75a–76a.

Decisions on appeal. The court of appeals reversed, relying on its earlier decision in *Nelson*, which the supreme court had not yet reversed. *See id.* at 64a. The Colorado Supreme Court granted certiorari and reversed both the *Nelson* and *Madden* cases on the same day, holding that a trial court has no statutory authority to issue a refund of restitution, costs, or fees, and that a defendant in Madden's position may only seek such a refund through a petition under Colorado's Exoneration Act. *Id.* at 36a.

REASONS FOR DENYING THE PETITION

I. This Court should not adjudicate a claim that was not adequately raised in the lower courts and that is based on a theory that Petitioners did not articulate until after the Colorado Supreme Court issued its opinion.

Petitioners ask this Court to adjudicate a new claim based on a due process theory they did not litigate in the state courts. Specifically, they ask the Court to address in the first instance an as-applied challenge to whether Colorado's Exoneration Act violates the Due Process Clause. This Court should deny certiorari review because: (1) Petitioners did not seek relief under the Act, (2) Petitioners did not present their current argument to the lower courts, and (3) accepting Petitioners' argument could harm the ability of State governments to respond appropriately to exonerations.

A. Because Petitioners did not seek relief under the Exoneration Act, there is not an adequate basis to evaluate their claim that it violates due process.

Petitioners insist that, because they are required to seek relief via the Exoneration Act, they have been deprived of sufficient meaningful process. Pet. 12–13. Yet because Petitioners never petitioned for relief under the Act, Petitioners' theory that the Act violates due process as applied to them has never been tested in the Colorado courts. This significant vehicle problem counsels against a grant of certiorari here.

Nor is there a body of Colorado case law interpreting or applying the Exoneration Act that could assist this Court in resolving the question presented. No lower court decision has analyzed the procedural aspects of the Act—including how it would apply to a defendant seeking a refund of costs, fees, and restitution. The Colorado Supreme Court majority concluded that the Act "provides sufficient process for defendants to seek refunds of costs, fees, and restitution," Pet. App. 20a, but that conclusion must be viewed in light of the court's recognition that "because [Petitioners] did not file a claim under the Act, it does not apply to this case." *Id.* at 12a; *see also id.* at 44a n.4.

Because they never availed themselves of the process provided by the Act, Petitioners' due process argument *presumes* that they would have been—and that other similarly situated defendants would be—unsuccessful in seeking relief under the Act. This presumption is not only untested through any attempt by Petitioners to obtain relief under the statute, but is unsupported by judicial interpretation or application of the statute. This Court generally does not weigh in on an issue—particularly as to the interpretation and application of a state statute—for the first time or in the absence of well-developed analysis in the lower courts, and it should not do so here.

B. In the lower courts, Petitioners focused on state-law budgetary and jurisdictional issues and did not adequately develop a due process argument.

Petitioners did not argue their current theory in the lower courts, and the court of appeals opinions did not mention either the Exoneration Act or due process. *See id.* at 50a–69a.[1] They were based instead on a particular reading of Colorado's restitution and court costs statutes: the court reasoned that since Colorado's statutes only authorize restitution and costs where there is a conviction, the statutes implicitly empower trial courts to order refunds where a conviction is reversed and not reinstated. The Colorado Supreme Court rejected that interpretation of the statutes.

The Exoneration Act was first discussed in briefing before the Colorado Supreme Court, although even there Petitioners did not make a due process argument. Instead, Petitioners' briefing centered on the purely state-law questions of (1) whether a trial court retains jurisdiction in a criminal case to order a refund of restitution, costs, and fees following reversal of a conviction, and (2) if so, whether any refund that is ordered should be paid out of the budget of the executive or the judicial branch. *See* Opp. App. at 7, 34–52.

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[1] Petitioner Nelson cited the due process clause in the "Applicable Law" section of her opening court of appeals brief, but she made no further argument or mention of it. *See* Opp. App. at 2–5. Petitioner Madden's court of appeals briefs do not refer to due process at all. *See id.* at 27–32.

The due process argument that Petitioners now raise for the first time is based on the opinion of the lone dissenter in the Colorado Supreme Court. The majority briefly discussed the due process issue. Pet. App. 20a–22a. But the focus of the opinion was on state law questions. Because Petitioners did not meaningfully develop their due process argument in the state courts—and have not (until now) argued that the Exoneration Act is unconstitutional as applied to them—a grant of certiorari would require this Court to address for the first time an issue that was not litigated by the parties below. The Court should decline to do so.

C. Considering the constitutionality of Colorado's exoneration statute, when Petitioners have not yet attempted to invoke it, could have detrimental consequences for other States.

Each State has its own unique constitutional provisions and statutes relating to costs, fees, and restitution—not to mention budgetary issues and separation of powers. For this Court to precipitously weigh in on Petitioners' untested claims, in the absence of well-developed arguments and decisions in the lower courts, could lead to the unintended consequence of requiring States to make drastic changes to a broad range of statutes and state funding mechanisms.

For example, more than half the States have some form of exoneration compensation statutes.[2] These statutes are intended to assist those who are wrongfully convicted and exonerated. Yet States may be reluctant to initiate, develop, or reform these and similar laws if they know this Court may pass judgment on the constitutionality of Colorado's, even where the complaining parties have not sought relief under it. A decision by this Court imposing a constitutional limit on States' ability to require defendants to follow the procedures outlined in their exoneration statutes would upset the delicate balance of these state laws, and this Court should decline to decide that question in a case where the Petitioners have neither attempted to comply with the procedures in the Act nor adequately litigated the Act's constitutionality in the lower courts.

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[2] Ala. Code § 29-2-150; Cal. Penal Code § 4900; Conn. Gen. Stat. Ann. § 54-102; D.C. Code § 2-421; Fla. Stat. Ann. § 961.03; 705 Ill. Comp. Stat. Ann. 505/8(C); Iowa Code Ann. § 663a.1; La. Rev. Stat. Ann. § 15:572.8; Me. Rev. Stat. Ann. tit. 14, § 8241; Md. Code Ann., State Fin. & Proc. § 10-501; Mass. Gen. Laws Ann. Ch. 258d, § 1; Minn. Stat. § 590.11; Miss. Code Ann. § 11-44-1; Mo. Ann. Stat. § 650.058; Mont. Code Ann. § 53-1-214; Neb. Rev. Stat. § 29-4608; N.H. Rev. Stat. Ann. § 541-B:14; N.J. Stat. Ann. § 52:4c-1; N.Y. Jud. Ct. Act § 8-B; N.C. Gen. Stat. Ann. § 148–82; Ohio Rev. Code Ann. § 2743.48; Okla. Stat. Ann. tit. 51, § 154; Tenn. Code Ann. § 9-8-108; Tex. Civ. Prac. & Rem. Code Ann. § 103.051; Utah Code Ann. § 78b-9-405(1)(A); Vt. Stat. Ann. tit. 13, § 5572; Va. Code Ann. § 8.01-195.10; W. Va. Code Ann. § 14-2-13a(B); Wa. Rev. Code Wash. (ARCW) § 4.100; Wis. Stat. Ann. § 775.05.

II. Petitioner's treatment of the case law is inaccurate: Colorado is not an outlier and its approach is not contrary to traditional practice.

Contrary to Petitioners' arguments, *see* Pet. 19–23, the decision below is not an outlier in need of correction. Many jurisdictions limit the procedures and circumstances by which a defendant whose conviction has been overturned can recover payments he or she made in connection with the conviction. For example, appellate courts in Wisconsin and Michigan have agreed that because a court cannot order a money judgment against the state absent statutory authority, an improper restitution order can be vacated only *prospectively*. *See, e.g., State v. Minniecheske*, 590 N.W.2d 17, 19–20 (Wis. Ct. App. 1998) (holding that although the trial court had jurisdiction to "remove the restitution order from the judgment of conviction," it lacked authority to order a money judgment against the State for a refund of wrongly collected restitution); *State v. Duerst*, 1999 Wisc. App. LEXIS 886, *6 (Wis. Ct. App. Aug. 12, 1999) (unpublished) (relying on *Minniecheske* to conclude that a criminal court lacked authority to order the State to refund money collected under an improper restitution order; instead, the defendant must file a "separate civil suit"); *People v. Diermier*, 531 N.W.2d 762, 763 (Mich. App. 1995) (declining to order a refund of restitution where the county "simply acted as a conduit in channeling defendant's restitution payments to the victim" and "had no statutory duty to refund it to defendant").

Indeed, for four other reasons, Colorado's approach to the issue presented does not make it an outlier.

First, Colorado—like other jurisdictions—distinguishes between an acquittal or dismissal based on a "wrongful conviction," which is considered "void," and a conviction that is simply "voidable." *See Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (where guilty plea was "void" because it was entered in violation of due process rights, defendant must be placed in status quo by a refund);[3] *First Nat'l Bank v. Fleisher*, 2 P.3d 706, 713 n.5 (Colo. 2000) (judgment is "void" only if court lacked subject matter or personal jurisdiction or acted in a manner inconsistent with due process of law). A void conviction is one that is invalid from its inception because it is illegal or unconstitutional, whereas a conviction may be voidable and reversed on appeal for any number of reasons unrelated to the defendant's actual guilt, such as procedural defects. The Colorado Supreme Court's decisions below established that as to voidable convictions (like Petitioners'), defendants must rely on the Exoneration Act for a refund of payments made in connection with the conviction.

This is similar to the line drawn in other jurisdictions between "void" and "voidable" convictions. *See, e.g.*, *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995) ("A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity."); *State v. Oney*, 993 N.E.2d 157, 165 (Ind. 2013) ("[T]he question of whether a conviction was either 'void' or 'voidable' is no mere semantic quibble. While a void judgment is one that, from its

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[3] The Colorado Supreme Court decisions in Petitioners' cases did not overrule or reject *Toland*; rather, the court distinguished it on its facts. *See* Pet. App. 20a n.5. *Toland* remains good law.

inception, is a complete nullity and without legal effect, a voidable judgment is not a nullity until superseded, reversed, or vacated."); *see also, e.g.*, *Ex parte Gibson*, 31 Cal. 619, 624–25 (Cal. 1867); *People v. Hubbard*, 964 N.E.2d 646, 647 (Ill. App. Ct. 2d Dist. 2012); *State v. Payne*, 873 N.E.2d 306, 311–12 (Ohio 2007); *State v. McDonnell*, 176 P.3d 1236, 1240 (Or. 2007); *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004); *Ex parte Seidel*, 39 S.W.3d 221, 224 (Tex. Crim. App. 2001); *Commonwealth v. Davis*, 36 Va. Cir. 120, 121 (Va. Cir. Ct. 1995).

Colorado's approach is also consistent with federal cases finding refunds appropriate when a defendant suffers a "wrongful conviction," as opposed to a conviction that is reversed followed by an acquittal on retrial. *See Telink, Inc. v. United States*, 24 F.3d 42, 45–46 (9th Cir. 1994) (discussing the availability of a refund where the defendant had been convicted under an insufficient indictment); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (discussing refund of fines imposed following guilty pleas where the criminal statute was found to be unconstitutional); *United States v. Venneri*, 782 F. Supp. 1091, 1094–95 (D. Md. 1991) (same).

The importance of the void/voidable distinction is evident in a federal district court case on which Petitioners rely, *United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972). *See* Pet. 22. That case is inapposite to Petitioners' cases, not only because it addressed a refund of "fines"—not costs, fees, or restitution—but because the defendant's exoneration came when the Act under which the defendant was convicted was declared unconstitutional. *Id.* at 836. Because the

conviction was therefore void—not merely voidable—the refund ordered in that case does not support Petitioners' argument that a refund is required as to their *voidable* convictions.

Second, although Petitioners are correct that a handful of states have specific statutes governing refunds for wrongful convictions, that does not make Colorado an outlier. *See* Pet. 19–20. In fact, it only confirms the Colorado Supreme Court's holding that legislation is required to authorize a refund of payments. Moreover, the state statutes that Petitioners cite would apply only partially—if at all—to payments in cases similar to Petitioners'. None of the cited statutes would provide a refund of restitution, and only one of the cited statutes would apply to provide a refund of courts costs; another would apply to provide a refund of fees. Pet. App. 19–20.[4]

Third, the authorities that Petitioners cite are distinguishable. Many of them are irrelevant to the question addressed by the Colorado Supreme Court because they involve separate civil cases, not proceedings in the criminal court.[5] Similarly, many of Petitioners' criminal-case authorities are

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[4] Tex. Code Crim. Proc. Art. 103.008(a) (providing for refund of costs); Miss. Code Ann. § 99-19-73 (12) (providing for refund of fees).

[5] *See* Pet. 16–17 (citing *Arkdelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929); *Haebler v. Myers*, 30 N.E. 963, 964 (N.Y. 1892); Restatement (First) of Restitution § 74; William A. Keener, *A Treatise on the Law of Quasi-Contracts* 417 (1893)).

distinguishable because they address only "fines" (criminal penalties), rather than costs, fees, or restitution—which are not criminal penalties. Pet. 18, 20–21.[6]

As for the state cases in the Petition that *do* involve a refund of restitution—of which there are only three—all are distinguishable. *See id.* at 21. In *Bogard v. State*, the Arkansas court concluded that because the defendant was found not guilty of the charged offense, restitution had been improperly ordered. 450 S.W.3d 690, 692 (Ark. Ct. App. 2014). That is inapposite here, as both Nelson and Madden were convicted of the charges for which payments were ordered. In *Commonwealth v. McKee*, the Pennsylvania court found statutory and rule authority for issuing a refund. 38 A.3d 879, 881 (Pa. Super. Ct. 2012). No such authority exists in Colorado. And in *Cooper v. Gordon*, the conviction was reversed due to the prosecution's alleged failure to disclose impeachment material. *See Cooper v. State*, 377 So.2d 1153, 1155 (Fla. 1979). In that context, the Florida court addressed the question of whether a trial court retains jurisdiction to consider a motion for return of funds—including both fines and other kinds

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[6] *See United States v. Rothstein*, 187 F. 268, 269 (7th Cir. 1911); *Devlin v. United States*, 12 Ct. Cl. 266, 272–73 (1876); *Merkee v. Rochester*, 13 Hun. 157, 162 (N.Y. Sup. 1878); *People ex. Rel. McMahon v. Board of Auditors*, 49 N.W. 921 (Mich. 1879)(unpublished opinion); *Telink*, 24 F.3d at 47; *Lewis*, 478 F.2d at 836. Although two of Petitioners' cases addressed court costs, *N.J. Soc'y for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 116–17 (N.J. 1908); *Lucas v. Commonwealth*, 41 Pa. C.C. 673, 675 (Pa. Ct. of Comm. Pleas 1914), that is hardly sufficient to constitute an established "tradition" that is contrary to Colorado's approach.

of payment—after the criminal charges are dismissed on remand. *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Ct. App. 1980). The court's affirmative answer to that question does not directly contradict the decisions of the Colorado Supreme Court below.

Fourth, Petitioners cite federal cases authorizing a refund of costs, fees, or restitution, Pet. at 20–23, but those cases are inapposite. In addition to the distinctions mentioned above, the federal courts' stated basis for authorizing refunds is the federal All Writs Act, which is broader than Colorado's All Writs Act in that it does not require constitutional or statutory authority to empower the issuance of a writ. *Compare* 28 U.S.C. § 1651(a) (providing that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law") *with* Colo. Rev. Stat. § 13-1-115 ("The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of the state."). Because the source of federal power to issue attendant writs is broader than Colorado's, and because of Colorado's express limitations on writs, federal cases granting refunds do not support Petitioners' claims.[7]

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[7] Nor do all the federal decisions reach the result Petitioners favor. At least one circuit has concluded that where the federal government collects and disburses restitution to a victim, the defendant has no right to recover such payments even if the conviction is overturned and charges are dismissed before retrial. *See United States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir. 2004) ("[T]he government merely served as an escrow agent pending the final judgment and at the proper time paid the funds over to the victims.").

III. Although they should not be addressed on the limited record before the Court, Petitioners' arguments are flawed on the merits.

Even if Petitioners were correct about Colorado's approach being unique, their assertion that the Act violates due process fails on the merits. Contrary to Petitioners' arguments, the payments at issue here are not "penalties" that must be overturned along with convictions; nor do the requirements of the Exoneration Act violate due process.

A. Costs, fees, and restitution are not monetary penalties that must be overturned when convictions are reversed.

Petitioners' due process argument hinges upon their repeated characterization of restitution, costs, and fees as "monetary penalties" or "criminal penalties." They argue that such payments are part of the punishment for a crime and therefore must be overturned when a conviction is reversed. Pet. 9–12, 14–15. That argument fails.

Petitioners cite several federal court decisions in support of their characterization, *Id.* at 20–22, but those are not determinative because the nature and purpose of payments associated with a conviction is an issue of *state* law. *See Auto-Owners Ins. Co. v. Smith*, 547 B.R. 774, 779 (E.D. Mich. 2016) ("It is not for a federal bankruptcy court to determine that full restitution in this case does not provide any societal or state benefit or any penal or rehabilitative ends - the

sovereign state of Michigan has already determined that it does.").[8]

In Colorado, court costs and fees are not punitive; rather, they are intended to offset the costs of prosecuting or rehabilitating the defendant. *See, e.g.*, *People v. Noel*, 134 P.3d 484, 487 (Colo. App. 2005) (probation supervision fees are not refundable when a conviction is reversed because the purpose of probation is primarily rehabilitative); *People v. Howell*, 64 P.3d 894, 899 (Colo. App. 2002) (costs are imposed to reimburse the state for the actual expenses incurred in prosecuting a defendant and are not punitive); *People v. McQuarrie*, 66 P.3d 181, 183 (Colo. App. 2002) (costs and surcharges are not a form of punishment). They are thus not "monetary penalties" as Petitioners argue.

Whether restitution is a "monetary penalty" is a more difficult question in Colorado, but the better view is that restitution is compensatory for victims, rather than punitive. That conclusion is supported by both the applicable statutes and case law.

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[8] To the extent that federal decisions are relevant, three federal circuits have concluded that criminal restitution is not a penalty or punishment. *See United States v. Wolfe*, 701 F.3d 1206, 1218 (7th Cir. 2012) ("[R]estitution is not a criminal penalty."); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006) (stating that restitution orders "are not in the nature of a criminal penalty"); *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (restitution under a federal statute "does not inflict criminal punishment, and thus is not punitive"); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) ("[R]estitution is not criminal punishment.").

With respect to statute, restitution is not described as a punishment or penalty; rather, the text of the governing statute confirms that the purposes of restitution in Colorado are primarily compensatory and remedial—not punitive—and that restitution orders are intended to remain in force for the benefit of victims. Colorado's restitution statute states that restitution is a way to "lessen the financial burdens inflicted upon [victims and] to compensate them for their suffering and hardship," as well as a mechanism "for the rehabilitation of offenders" and to "aid the offender in reintegration as a productive member of society." Colo. Rev. Stat. § 18-1.3-601. The statute further provides that a restitution order "shall be a final civil judgment in favor of the state and any victim" and that "[n]otwithstanding any other civil or criminal statute or rule, any such judgment shall remain in force until the restitution is paid in full." *Id.* § 18-1.3-603(4)(a).

The weight of Colorado case law confirms the plain text of the restitution statute. Both the Colorado Supreme Court and the Colorado Court of Appeals have recognized that the purpose of restitution is to "make the victim of the criminal offense whole." *People v. Borquez*, 814 P.2d 382, 385 (Colo. 1991); *People v. McCann*, 122 P.3d 1085, 1087 (Colo. App. 2005) ("The purpose of restitution is to make the victim whole."); *see also People v. Estes*, 923 P.2d 358, 360 (Colo. App. 1996) (concluding that the purpose of restitution is to facilitate "repayment of the actual pecuniary damage the victim sustains as the direct result of the defendant's conduct").

Although in the double jeopardy context, the court of appeals has concluded that restitution can be considered punitive, *see, e.g.*, *People v. Harman*, 97 P.3d 290, 293 (Colo. App. 2004); *People v. Shepard*, 989 P.2d 183, 186–87 (Colo. App. 1999),[9] in other contexts, the court of appeals has distinguished restitution from punitive measures like fines and monetary penalties because it is not simply a punishment, but "serves to make the victim whole." *See People v. Stafford*, 93 P.3d 572, 574 (Colo. App. 2004) ("[F]or purposes of Eighth Amendment analysis, restitution is not the equivalent of a fine. A fine is solely a monetary penalty, while restitution serves to make the victim whole."); *People v. Cardenas*, 262 P.3d 913, 915 (Colo. App. 2011) ("[R]equiring defendant to pay postjudgment interest on the restitution amount is ... not a fine .... [A] fine is solely a monetary penalty, but postjudgment interest is a statutory mechanism designed to achieve the legislature's goal of making victims whole by encouraging defendants to pay restitution promptly.").

In the key case of *People v. Daly*, the court of appeals considered whether a restitution order should be abated when the defendant dies while a direct appeal from the conviction is pending. 313 P.3d 571 (Colo. App. 2011). It concluded that even though the defendant's death "renders the whole proceeding a nullity" such that the conviction itself must be abated

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[9] The Colorado Supreme Court has not approved these decisions or squarely addressed whether restitution can be considered punitive. In *People v. Woodward*, the supreme court granted certiorari to address the question of whether restitution constitutes "punishment" for *ex post facto* purposes, but ultimately found it unnecessary to decide the issue. 11 P.3d 1090, 1093 (Colo. 2000).

ab initio, restitution orders—unlike fines or other monetary penalties—remain in place despite the defendant's death. *Id.* at 573–74. That is because restitution "is more compensatory in nature than penal." *Id.* at 574–75 (quoting *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001)). The court emphasized that in Colorado, the legislature has "expanded the right [to restitution] beyond a simple sentencing condition by mandating that restitution orders create final civil judgments." *Id.* at 576. Finally, the court noted that restitution is not limited to damage caused by the charged conduct but can include losses caused by acts that were not the subject of the criminal charges: "Although a restitution order can only be entered to compensate a victim for losses caused by a defendant's criminal conduct after a defendant has been convicted of a crime, a restitution order may properly include losses a victim incurred resulting from a defendant's uncharged acts." *Id.* at 577.

Thus, even though Colorado courts have held that restitution may be considered punitive in the limited context of the restriction on double jeopardy, the weight of the authority establishes that restitution serves different purposes and is treated differently than fines and other criminal penalties in Colorado. A restitution order creates a civil judgment in favor of the injured victim, and payments are made to the victim, not the state. *See* Colo. Rev. Stat. § 18-1.3-603(4)(a). Just as restitution is not automatically abated in the event of a defendant's death, *Daly*, 313 P.3d at 578, or when charges are dismissed after the expiration of a deferred judgment, *see* Colo. Rev. Stat. § 18-1.3-603(4)(a), neither is restitution a monetary penalty

that must be refunded by the state upon reversal of a conviction.[10]

B. The requirements of the Exoneration Act do not violate due process.

The Exoneration Act does not violate the Due Process Clause in requiring a defendant whose conviction has been overturned to file a separate petition and to prove his or her entitlement to a refund by clear and convincing evidence.

It is telling that Petitioners do not cite a single on-point decision to support their argument that the Act violates due process. Rather, they argue by analogy to the return of monies collected under an unconstitutional tax. Pet. 11–12. But that analogy is flawed: a tax that is prohibited by the Constitution is very different from a restitution order under a conviction—after the full protections of trial—that is reversed on appeal. Convictions may be reversed for any number of reasons, ranging from actual innocence, to constitutional error, to lawyer or jury misconduct, to technical legal errors at trial. *See id.* at 15 (asserting that "[m]ost grounds for reversal involve legal errors that took place at trial"). Yet a conviction is only "wrongful" if the defendant is actually innocent of the charged crime. *See* 2013 Colo. Sess. Laws 2412 ("[A]n innocent person who has been wrongly convicted ... has

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[10] Even if Petitioners were correct that costs, fees, and restitution are monetary penalties, that would not undermine the Colorado Supreme Court's conclusion that trial courts lack statutory authority to order a refund of such payments. Nor would that trigger a requirement as a matter of constitutional law that the payments be automatically refunded.

been uniquely victimized."); Colo. Rev. Stat. § 13-65-103(2)(e)(V) (requiring compensation of exonerated persons in case of "wrongful conviction"); *see also Kansas v. Marsh*, 548 U.S. 163, 210 n.7 (2006) (citing with approval *People v. Smith*, 708 N.E.2d 365, 371 (Ill. 1999) ("[W]hile a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous.... Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof.")).

Here, the Colorado Supreme Court correctly held that in Petitioners' cases—where the convictions were not void or abated *ab initio* but were instead reversed based on a violation of evidentiary rules (as to Petitioner Nelson) and ineffective assistance of counsel (as to Petitioner Madden)—the "money that [wa]s withheld pursuant to clear statutory authority while a conviction is in place [wa]s not wrongfully withheld." Pet. App. 43a; *see also Daly*, 313 P.3d at 577–78 (upholding a restitution order even when the conviction was abated due to the defendant's death because "when the civil judgment here was created, there was a criminal conviction, and the court had issued a restitution order based on that conviction").

The Exoneration Act provides a clear process for those who have been wrongfully convicted to petition for relief, including for a refund of payments made in connection with the conviction. Due process requires "notice and the opportunity for a meaningful hearing before an impartial tribunal." *Van Sickle v. Boyes*, 797 P.2d 1267, 1273–74 (Colo. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976)). The process provided by the Exoneration Act satisfies these

requirements, *see* Colo. Rev. Stat. § 13-65-102, although Petitioners chose not to avail themselves of that process. Nor does it violate the Constitution that Colorado's General Assembly chose to condition relief under the Act on satisfying a "clear and convincing" evidentiary burden. Of the 30 jurisdictions that provide some mechanism for compensation of exonerated persons, 15 of them require a showing of actual innocence by clear and convincing evidence.[11] None of those statutes have been found to violate due process.

The conclusion that the Act provides sufficient process is not undermined by Petitioners' speculation that defendants (and their lawyers) will be unwilling to follow the procedures in the Act "because the sums involved are typically too small to justify the expense of a full-blown civil trial." Pet. 13. That argument assumes not only that the petitions will be contested, *see* Colo. Rev. Stat. § 13-65-102(5)(d), (6)(a) (discussing uncontested petitions), but that the ability to recover attorney fees for a successful petition is inadequate incentive for any lawyer to bring such cases. *See id.* § 13-65-103(2)(e)(IV). Petitioners provide no evidence to support such a theory, and it does not establish a violation of due process.

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[11] Colo. Rev. Stat. § 13-65-102(6)(b); D.C. Code § 2-421; Fla. Stat. Ann. § 961.03; Iowa Code Ann. § 663a.1; La. Rev. Stat. Ann. § 15:572.8; Me. Rev. Stat. Ann. tit. 14, § 8241; Mass. Gen. Laws Ann. Ch. 258d, § 1; Neb. Rev. Stat. § 29-4608; N.J. Stat. Ann. § 52:4c-1; N.Y. Jud. Ct. Act § 8-B; Okla. Stat. Ann. tit. 51, § 154; Utah Code Ann. § 78b-9-405(1)(A); Wa. Rev. Code Wash. (ARCW) § 4.100; W. Va. Code Ann. § 14-2-13a(B); Wis. Stat. Ann. § 775.05.

Petitioners seek to impose a constitutional rule requiring every jurisdiction to automatically refund payments associated with a conviction when the conviction is overturned on appeal, regardless of the reason for the reversal. Although a legislature may choose to implement such a standard, *see* Pet. 19–20 (citing state statutes that provide for refunds), it is not required by the Constitution. The Colorado Supreme Court correctly concluded that the process provided by the Exoneration Act satisfies constitutional requirements.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

COURT OF APPEALS, STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

Case Number: 11CA1206

[Filed October 11, 2011]

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee,	)
v.	)
SHANNON NELSON, Defendant-Appellant.	)

Arapahoe County District Court
Case No. 04CR0652
Hon. Marilyn L. Antrim, Judge

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OPENING BRIEF

STATEMENT OF THE ISSUE

I. Whether the district court erroneously denied the defendant-appellant's motion for return of restitution payments she made prior to the reversal of her conviction and subsequent acquittal in this matter.

* * *

SUMMARY OF THE ARGUMENT

I. The district court erroneously denied Ms. Nelson's motion for return of restitution payments she made prior to the reversal of her conviction and subsequent acquittal in this matter because failing to return the money Ms. Nelson previously paid would be contrary to the legislative intent of the statutes providing for such payments.

ARGUMENT

I. The district court erroneously denied the defendant-appellant's motion for return of restitution payments she made prior to the reversal of her conviction and sentence in this matter.

A. Standard of Appellate Review and Record Reference

The proper construction of a statute is a question of law that must be reviewed *de novo*. People v. Manzo, 144 P.3d 551 (Colo. 2006); Fendley v. People, 107 P.3d 1122 (Colo. App. 2004). A district court has broad discretion to determine a restitution order's terms and conditions, and an appellate court will review for an

abuse of discretion. People v. Pagan, 165 P.3d 724 (Colo. App. 2006).

In this case, the district court denied Ms. Nelson's Motion for Return of Payments By Ms. Nelson Prior To Reversal of Judgment and Acquittal. (CD, 04CR652 Gonser, pp. 5.)

B. Applicable Law

When construing a statute, courts must ascertain and give effect to the intent of the General Assembly. Fendley v. People, 107 P.3d 1122 (Colo. App. 2004). To determine the General Assembly's intent in enacting a statute, courts look first to the plain language of the statute and interpret statutory terms in accordance with their commonly accepted meaning. Id. Courts must read and consider a statute as a whole "to give consistent, harmonious, and sensible effect to all of its parts." People v. Hernandez, 160 P.3d 263 (Colo. App. 2007). Courts may not adopt a construction that renders any word superfluous. Id. When the plain language of a statute is free from ambiguity, other rules of statutory construction are unnecessary. Id.

In Colorado, trial courts must order restitution payments for the benefit of the party immediately and directly aggrieved by a defendant who is convicted of a criminal act. C.R.S. §18-1.3-205; C.R.S. §18-1.3-602. Payment of restitution is authorized only as to the victim of a defendant's conduct, and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct. People v. Borquez, 814 P.2d 382 (Colo. 1991); People v. Robb, 215 P.3d 1253 (Colo. App. 2009).

C.R.S. §24-4.2-104(1)(a)(I) permits a surcharge to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the victims and witnesses assistance and law enforcement fund. Likewise, C.R.S. §24-4.1-119(1)(a) permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the crime victim compensation fund. Furthermore, C.R.S. §13-32-105 permits docket fees to be assessed in criminal actions in the amount of $30 and an additional $5 surcharge, payable only when there is a conviction of the defendant. However, C.R.S. §16-18-101(1) requires costs in criminal cases to be paid by the state when a defendant is acquitted. No person shall be denied property without due process of law. U.S. Const. Amend. V and XIV §1; Colo. Const. Art. II §25.

C. Facts and Analysis

In Ms. Nelson's case, the Court of Appeals reversed her judgment of conviction after her first trial, thereby reversing all previous sentencing orders, which included orders to pay restitution and other fines, fees, and costs. Furthermore, after Ms. Nelson's second trial, the jury acquitted her of all remaining charges, so that she was not convicted of any crime in this matter. Accordingly, Ms. Nelson cannot be ordered to pay *any* restitution, court costs, victims' compensation fund fees, victims' assistance surcharges, or time payment fees related to the charges in this case.

Here, Ms. Nelson paid a total of $681.35 while her first appeal was pending. Now that she has been acquitted of all charges, the amount she previously

paid must be returned to her. Under the circumstances of this case, failing to return the money Ms. Nelson previously paid toward restitution and other fines, fees, and costs would be contrary to the legislative intent of the statutes providing for such payments. Even the prosecution in this case acknowledged that returning Ms. Nelson's payments to her "makes sense," but the prosecution asserted that "there is, unfortunately, not a mechanism to reverse" the payments. (CD, 04CR652 Gonser, pp. 2.) To the contrary, the "mechanism" by which the payments would be reversed is an order by the district court for the return of all payments Ms. Nelson previously made. Accordingly, the district court should have granted Ms. Nelson's Motion for Return of Payments, and the court abused its discretion by failing to do so.

CONCLUSION

For the foregoing reasons, this Court of Appeals should reverse the district court's denial of Ms. Nelson's Motion for Return of Payments By Ms. Nelson Prior To Reversal of Judgment and Acquittal.

Respectfully submitted this 11th day of October, 2011.

/s/ _____

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APPENDIX 2

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Case Number: 13SC495

[Filed December 8, 2014]

THE PEOPLE OF THE STATE OF COLORADO, Petitioner,	)
v.	)
SHANNON NELSON, Respondent.	)

Court of Appeals, State of Colorado
Case No. 11CA1206

Arapahoe County District Court
Case No. 04CR0652

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ANSWER BRIEF

STATEMENT OF THE ISSUES

I. Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him.

II. Where the court of appeals ordered the State to refund restitution, which branch of the government is responsible for the refund.

* * *

SUMMARY OF THE ARGUMENT

A criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either the defendant's acquittal or his/her conviction being vacated and the prosecution electing not to retry him/her. Such a refund of the money previously paid is consistent with the legislative intent of the statutes providing for such payments.

Where the court of appeals ordered the State to refund restitution, the executive branch is responsible for the refund of court costs and fees pursuant to section 16-18-101, C.R.S. (2012), while both the executive and judicial branches could be responsible for the refund of restitution via the Victim Compensation Fund and the judicial collection enhancement fund.

ARGUMENTS

I. A criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him.

A. Standard of Appellate Review and Record Reference

The question of whether a district court has the authority to order a refund of restitution, fees, and costs previously paid presents a question of law that appellate courts review *de novo*. See People v. Pino, 262 P.3d 938, 940 (Colo. App. 2011). Likewise, the proper construction of a statute is a question of law that must be reviewed *de novo*. People v. Manzo, 144 P.3d 551 (Colo. 2006); Fendley v. People, 107 P.3d 1122 (Colo. App. 2004).

In this case, Ms. Nelson preserved this issue by filing a Motion for Return of Payments By Ms. Nelson Prior To Reversal of Judgment and Acquittal, which the district court denied. (PR, CF, Vol. 4, pp. 854-858; R. Tr. 5/5/11, pp. 5.)

B. Applicable Law

Pursuant to the Colorado Constitution, "district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases." Colo. Const. art VI, §9(1). As courts of general jurisdiction, the district courts in Colorado have the authority to consider questions of law and of equity and to award legal and

equitable remedies. Ashton Props., Ltd. v. Overton, 107 P.3d 1014, 1017 (Colo. App. 2004). The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state. §13-1-115, C.R.S. (2012).

When construing a statute, courts must ascertain and give effect to the intent of the General Assembly. Fendley v. People, 107 P.3d 1122 (Colo. App. 2004). To determine the General Assembly's intent in enacting a statute, courts look first to the plain language of the statute and interpret statutory terms in accordance with their commonly accepted meaning. Id. Courts must read and consider a statute as a whole "to give consistent, harmonious, and sensible effect to all of its parts." People v. Hernandez, 160 P.3d 263 (Colo. App. 2007). Courts may not adopt a construction that renders any word superfluous. Id. When the plain language of a statute is free from ambiguity, other rules of statutory construction are unnecessary. Id.

In Colorado, trial courts must order restitution payments for the benefit of the party immediately and directly aggrieved by a defendant who is convicted of a criminal act. §18-1.3-205, C.R.S. (2012); §18-1.3-602, C.R.S. (2012). Payment of restitution is authorized only as to the victim of a defendant's conduct, and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct. People v. Borquez, 814 P.2d 382 (Colo. 1991); People v. Robb, 215 P.3d 1253 (Colo. App. 2009).

Section 24-4.2-104(1)(a)(I), C.R.S. (2012), permits a surcharge to be levied on criminal actions only when resulting in conviction or in a deferred judgment and

sentence, to be transmitted for credit to the victims and witnesses assistance and law enforcement fund. Likewise, section 24-4.1-119(1)(a), C.R.S. (2012), permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the crime victim compensation fund. Furthermore, section 13-32-105, C.R.S. (2012), permits docket fees to be assessed in criminal actions in the amount of $30 and an additional $5 surcharge, payable only when there is a conviction of the defendant. Section 16-18-101(1), C.R.S. (2012), requires costs in criminal cases to be paid by the state when a defendant is acquitted.

In June 2013, the Colorado General Assembly passed the Compensation for Certain Exonerated Persons Act, which established a civil claim for relief whereby "a person who has been convicted of a felony in this state and sentenced to a term of incarceration as a result of that conviction and has served all or part of such sentence . . . may be eligible for compensation . . . upon a finding that the person was actually innocent of the crime for which he or she was convicted." §13-65-102(1)(a), C.R.S. (2013). Under the Act, a person may file a petition for compensation only after a court has vacated or reversed all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence, and after (a) an order of dismissal of all charges or (b) an acquittal of all charges after retrial. §13-65-102(2)(a), C.R.S. (2013).

In addition to compensation for years of wrongful incarceration, the Act entitles an exonerated person to compensation for "the amount of any fine, penalty,

court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication. This subparagraph (V) shall not be interpreted to require the reimbursement of restitution payments by any party to whom the exonerated person made restitution payments as a result of his or her wrongful conviction or adjudication." §13-65-103(2)(e)(V), C.R.S. (2013).

Pursuant to the Act, the petition shall name the state of Colorado as the respondent, and the attorney general and the district attorney of the judicial district in which the case originated shall each have a separate and concurrent authority to intervene as parties to a petition. §13-65-102(5)(b), C.R.S. (2013). If a district court determines a person to be eligible to receive compensation pursuant to the Act, the district court shall direct the state court administrator to compensate an exonerated person. §13-65-103(1), C.R.S. (2013). The Act is funded by general-fund appropriations allocated to the judicial department. See 2013 Colo. Sess. Laws 2426-27; see also Long Bill HB 14-1336, pp. 118.

C. Facts and Analysis

In Ms. Nelson's case, the Court of Appeals reversed her judgment of conviction after her first trial, thereby reversing all previous sentencing orders, which included orders to pay restitution and other fines, fees, and costs. Furthermore, after Ms. Nelson's second trial, the jury acquitted her of all remaining charges, so that she was not convicted of any crime in this matter. Accordingly, Ms. Nelson cannot be ordered to pay any restitution, court costs, victims' compensation fund fees, victims' assistance surcharges, or time payment

fees related to the charges in this case, and the district court had jurisdiction to order a return of all funds she previously paid.

1. Costs and Fees

Here, the Court of Appeals properly relied on the Colorado Supreme Court's decision in Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961), in holding that Ms. Nelson "was entitled to seek, and the district court was authorized to award, a refund of the fees and costs that Nelson paid in connection with her now overturned conviction." People v. Nelson, 2013 COA 58 ¶16. The Toland court held that when a conviction is vacated, the parties should be "placed in *status quo* by refund to the defendant of the sums paid as fine and costs." Toland, 147 Colo. at 586, 364 P.2d at 593.

Nevertheless, in the Opening Brief, the People assert that "since costs are part of the judgment of conviction, it makes sense that a defendant who is acquitted does not pay for costs of *that* trial, but there is still no provision in the costs statutes for a refund of the first trial where defendant was convicted." (Op. Brf. at 13.) To the contrary, section 24-4.1-119(1)(a) permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the crime victim compensation fund. Section 16-18-101(1) requires costs in criminal cases to be paid by the state when a defendant is acquitted. Where a judgment of conviction is reversed, the accompanying sentence, which includes imposition of costs, is also reversed. Accordingly, the clear intent of these statutes is that a defendant is not required to pay costs and fees when he or she is ultimately acquitted of a crime, regardless of

when the acquittal occurs. Therefore, the Court of Appeals properly held that defendants in Ms. Nelson's position are entitled to a refund of all fees and costs previously paid in connection to a conviction which is subsequently overturned.

2. Restitution

Furthermore, the Court of Appeals properly held that "in addition to her right to seek a refund of the fees and costs that she paid, Nelson is entitled to seek, and the district court is authorized to award, a refund of the restitution that Nelson paid in connection with her overturned conviction." People v. Nelson, 2013 COA 58 ¶21. Where no published Colorado appellate decisions have addressed this issue, the Court of Appeals properly followed other jurisdictions which have held that defendants may seek refunds of restitution paid in connection with a conviction that is subsequently overturned.

For example, the Court of Appeals in this case cited Telink, Inc. v. United States, 24 F.3d 42, 47 (9th Cir. 1994), which held that if defendants prevail in setting aside their convictions, then wrongly paid fines would be "automatically refunded" without requiring a separate civil action. The Court of Appeals here also cited United States v. Beckner, 16 F. Supp. 2d 677, 679 (M.D. La. 1998), which held that the district court had jurisdiction "to carry out its obligation to completely vacate all aspects of the erroneous [judgment] issued by it," including payment of restitution. In following these other jurisdictions, the Court of Appeals in this case agreed with the reasoning that "the interests of justice make it imperative that the petitioner receive a refund

of his restitution." Citing United States v. Venneri, 782 F. Supp. 1091, 1093 (D. Md. 1991).

The interests of justice require a refund of restitution because when a conviction is reversed and a case is remanded for a new trial, there is no valid conviction to which any restitution may be tied. See People v. Scearce, 87 P.3d 228, 235 (Colo. App. 2003) (vacating a restitution order in connection with the reversal of a conviction on appeal). Since a district court is empowered to set aside a conviction, it should also correct the unlawful result of the conviction and require the repayment of any money collected as fines. See United States v. Lewis, 478 F.2d 835, 836 (5th Cir. 1973). Thus, where the prosecution has failed to prove beyond a reasonable doubt that a defendant is guilty of charged crimes, courts should allow the defendant to seek a refund of the restitution previously paid.

Nevertheless, the People assert in the Opening Brief that "the legislature has determined that in two particular circumstances, a restitution order may not be automatically vacated, even where the defendant's conviction does not stand," so that "there is not always a 'conviction' to which to tie the restitution order." (Op. 13 Brf. at 25-26.) However, the two circumstances in which a restitution order is kept in place despite the lack of a final conviction are: (a) when a defendant successfully terminates a deferred judgment and sentence, and (b) when a defendant dies before completion of his direct appeal. See HB14-1035; People v. Daly, 313 P.3d 571 (Colo. App. 2011). In both of these circumstances, the prosecution has still proven that the defendant's conduct is the cause of the victim's pecuniary damage, thus distinguishing these

circumstances from cases in which the judgment of conviction is reversed and the defendant is acquitted, such as in Ms. Nelson's case. Therefore, where a defendant's conviction is reversed and the defendant is subsequently acquitted or the prosecution elects not to retry him/her, the restitution order is automatically vacated and the defendant is entitled to a refund of any restitution he/she previously paid.

3. Ancillary Jurisdiction

Furthermore, where no published Colorado appellate decisions have addressed the mechanism by which a defendant may seek a refund of restitution, the Court of Appeals in this case properly followed other jurisdictions which have addressed this issue. The Court of Appeals cited numerous other jurisdictions which have held that a defendant who pays fines or restitution based on a conviction that is later set aside may seek a refund in the pending criminal case without having to file a separate civil action. See, e.g., Telink, 24 F.3d at 47 (where defendants prevail in setting aside their convictions, then wrongly paid fines would be automatically refunded without separate civil action); United States v. Lewis, 478 F.2d 835, 836 (5th Cir. 1973)(a person should not be required to resort to multiplicity of actions in order to obtain reimbursement of money to which he is entitled); Cooper v. Gordon, 389 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980)(district court had jurisdiction to entertain defendant's motion for a refund of the fines, costs, and restitution that he paid before his conviction was reversed).

Moreover, the Court of Appeals in this case properly found guidance in the Colorado Supreme Court's decision in People v. Hargrave, 179 P.3d 226 (Colo.

App. 2007), while acknowledging that Hargrave is not directly on point. The Hargrave court held that the district court in a criminal proceeding had ancillary jurisdiction, or inherent power, to entertain the defendant's post-sentence motion for the return of seized property. Id. at 230. The Court of Appeals properly reasoned that the district court had ancillary jurisdiction over Ms. Nelson's motion for a refund of restitution because: (1) Nelson's refund petition arose from the same transaction that was the basis of the main proceeding; (2) her petition could be determined without a substantial new factfinding proceeding; (3) deciding her refund petition would not deprive any party of a substantial procedural or substantive right; and (4) Nelson's refund petition must be settled to ensure that the disposition of the underlying criminal proceeding will not be frustrated. People v. Nelson, 2013 COA 58 ¶25. Also, as the Court of Appeals concluded, judicial economy would be better served by allowing the refund of restitution, fees, and costs to be resolved in the criminal proceeding by the court that tried the case. Id. at ¶26. The Court of Appeals' reasoning in this case is sound and supported by other jurisdictions which have reached the same conclusion.

4. The Compensation for Certain Exonerated Persons Act

In the Opening Brief, the People focus on the requirement in the Compensation for Certain Exonerated Persons Act ("the Compensation Act") that a person must prove actual innocence in order to obtain a refund of costs, fees, and restitution, arguing that a person who does not prove actual innocence is not entitled to a refund of fines previously paid. (Op. Brf. at

18-19.) This argument is misplaced. It is logical that in order to be eligible for compensation in the amount of $70,000 for each year of wrongful incarceration pursuant to the Compensation Act, a person must establish that he or she was actually innocent of the crime for which he or she was convicted. §13-65-103(3)(a), C.R.S. (2013). In contrast, a person who simply seeks a refund of costs, fees, and restitution he/she previously paid after his/her conviction has been vacated need not establish actual innocence because these fines are based on a defendant's conviction or acquittal, not based on actual guilt or innocence. Thus, the recovery of wrongly paid fines and restitution is incident to the vacating and setting aside of a wrongful conviction, which is distinguished from the payment of compensation to persons who must establish they are actually innocent and have been wrongfully incarcerated.

Additionally, the People assert that federal cases have found a refund appropriate only "when a defendant suffers a 'wrong conviction,' as opposed to an acquittal on retrial." (Op. Brf. at 15.) However, the cases cited in support of this assertion do not involve claims of actual innocence; rather these cases involve convictions based on an insufficient indictment or an unconstitutional statute. See Telink, Inc. v. United States, 24 F.3d 42 (9th Cir. 1994) (convicted pursuant to an insufficient indictment); United States v. Lewis, 478 F.2d 835 (5th Cir. 1973) (guilty pleas entered pursuant to unconstitutional statute); United States v. Venneri, 782 F. Supp. 1091 (D. MD 1991) (convicted pursuant to unconstitutional statute). Contrary to the People's suggestion, these federal cases found

defendants were entitled to a refund of fines without requiring a finding of actual innocence.

Likewise, a person seeking compensation pursuant to the Compensation Act must file a separate civil action so that a district court can determine whether the person has established actual innocence and thereby eligible to receive compensation for each year of wrongful incarceration. However, a person should not be required to file a separate civil action merely for a refund of costs, fees, and restitution he/she previously paid because such payments are part of the original conviction and sentence, and the recovery of such payments is incident to the vacating of a wrongful conviction. Therefore, the Compensation Act does not prevent a non-exonerated person from obtaining a refund of previously paid costs, fees, and restitution.

5. Summary

In this case, Ms. Nelson paid a total of $681.35 while her first appeal was pending. Now that she has been acquitted of all charges, the amount she previously paid must be returned to her. The fact that she did not establish actual innocence is irrelevant, because the determination of whether she must pay fees, costs, and restitution is based on her conviction or acquittal, not based on actual guilt or innocence. Additionally, the fact that she filed the motion for refund after the order of acquittal was entered is not untimely, and eight months was a reasonable time after the judgment was entered to file the motion. See Hargrave, 179 P.3d 226 (holding that district court had ancillary jurisdiction to entertain defendant's post-sentence motion for return of seized property where defendant filed the motion seven months after he was

sentenced). Under the circumstances of this case, failing to refund the money Ms. Nelson previously paid toward restitution and other fines, fees, and costs would be contrary to the legislative intent of the statutes providing for such payments.

II. Where the court of appeals ordered the State to refund costs, fees, and restitution, the executive branch is responsible for the refund of court costs and fees, while both the executive and judicial branches could be responsible for the refund of restitution.

A. Applicable Law

Section 16-18-101(1), C.R.S. (2012), requires costs in criminal cases to be paid by the state when a defendant is acquitted. Additionally, pursuant to the Crime Victim Compensation Act, the Victim Compensation Board ("the Board") reimburses victims for expenses incurred due to the commission of a crime. See § 24-4.1-101, et seq., C.R.S. (2013). The Board is responsible for making compensation awards to crime victims for reasonable expenses proximately caused by a criminal act, the funds of which are derived primarily from surcharges paid by criminal defendants. See §§ 24-4.1-102(10)(a)(I), 24-4.1-103, 24-4.1-105, C.R.S. (2013). The awards are based on the Board's approval of each victim's application for compensation, and awards are not dependent on the defendant's conviction. See §§ 24-4.1-108, 24-4.1-112, C.R.S. (2013).

A district court may order restitution to be paid either (a) directly to the victim or (b) to the Board if the Board has paid a claim to a victim and the amount is collected and disbursed by either the Department of

Corrections or the Judicial Department's collections investigator. The court administrator of each judicial district maintains a Victim Compensation Fund for the benefit of eligible applicants, which is primarily funded by monies levied for victim compensation in the form of costs, surcharges, or federal monies. § 24-4.1-117(2), C.R.S. (2013). All money in the fund is to be used "solely for the compensation of victims." §24-4.1-117(5), C.R.S. (2013).

Additionally, defendants who are "assessed any fines, fees, costs, surcharges, or other monetary assessments with regard to the sentencing, disposition, or adjudication of a felony, misdemeanor, juvenile delinquency petition, petty offense, traffic offense, or traffic infraction" are subject to time payment fees and late payment fees. §16-11-101.6(1), C.R.S. (2013); §16-18.5-104, C.R.S. (2013). All time payment fees and late payment fees collected, as well as "reasonable costs incurred and collected by the state" are to be credited to the judicial collection enhancement fund. §16-11-101.6(2), C.R.S. (2013). The general assembly is required to make annual appropriations from the judicial collection enhancement fund to the judicial department "for administrative and personnel costs incurred in collecting restitution, fines, costs, fees, and other monetary assessments." Id.

B. Facts and Analysis

The Court of Appeals in the current case acknowledged that "in certain cases, the state may be required to refund monies that it has already disbursed to third parties (i.e., people and entities not controlled by the state)." People v. Nelson, 2013 COA 58 ¶28. The Court of Appeals properly concluded that such a result

is reasonable because (1) it was the state's action that ultimately resulted in the wrongful payment of restitution; (2) the state necessarily assumed the risk that the conviction could ultimately be overturned; (3) it is inappropriate for former criminal defendants to file lawsuits or other proceedings against crime victims to recover restitution; (4) it is more palatable for the state to recover restitution from crime victims and service providers; and (5) the risk of a wrongly paid restitution award should rest with the state, which collected the restitution funds but then ultimately failed to prove its case. Id. at ¶29-33.

The question of which branch of government should refund costs and fees is straightforward: the executive branch should refund costs and fees because pursuant to section 16-18-101, costs are to be paid by the state when a defendant is acquitted. Thus, when a defendant is acquitted after retrial, the prosecution must refund the costs previously paid by the defendant in order to put the parties "in *status quo*" because the prosecution is required to pay costs when a defendant is acquitted. Toland, 147 Colo. at 586, 364 P.2d at 593.

The issue of which branch of government should refund restitution is more complex. If the defendant originally paid restitution through the Victim Compensation Fund, then the executive branch should refund any restitution originally paid by the defendant, because the Victim Compensation Fund is administered by the district attorney's office. Restitution awards are based on the Victim Compensation Board's approval of each alleged victim's application for compensation, and may be awarded regardless of whether the defendant is convicted or

acquitted of the charged offenses and regardless of whether the defendant is ordered to pay restitution. See §24-4.1-108, C.R.S. (2012); §24-4.1-110, C.R.S. (2012). Thus, the legislature has expressed an intent to pay victims restitution from state funds when the defendant is not required to pay restitution because he or she has been acquitted. As such, it is reasonable for the state to bear the cost of refunding restitution previously paid by defendants whose convictions are later vacated.

Although the provisions governing the Victim Compensation Fund do not expressly authorize refunds to defendants, such refunds are properly implied by section 24-4.1-110(3), which states: "If a defendant is ordered to pay restitution . . . to a person who has received compensation awarded under this part 1, an amount equal to the compensation awarded shall be transmitted from such restitution to the board for allocation to the fund." This provision requires that when a person has received compensation from the Victim Compensation Fund before the defendant has been convicted and ordered to pay restitution, then any subsequent restitution must be transmitted to the Victim Compensation Fund. This provision suggests that in the reverse situation, when a person has received restitution from the defendant via the Victim Compensation Fund before the defendant is ultimately acquitted and the restitution order is vacated, then any previously paid restitution must be returned to the defendant from the Victim Compensation Fund.

If the defendant originally paid restitution directly to the alleged victim and is ultimately acquitted of the charged offenses, the defendant could still be refunded

any previously paid restitution from the Victim Compensation Fund, which would have awarded restitution to the alleged victim regardless of whether the defendant was convicted or acquitted. This would put the parties in *status quo* because the Victim Compensation Fund would have paid the restitution to the alleged victim even if the defendant had been originally acquitted.

Additionally, if the defendant originally paid restitution directly to the alleged victim and is ultimately acquitted of the charged offenses, then the judicial branch, which administers the judicial collection enhancement fund, could also refund any restitution the defendant previously paid. Although the judicial collection enhancement fund does not expressly provide for a refund of previously paid restitution, this fund could refund restitution because it is funded with fees paid by defendants who are "assessed any fines, fees, costs, surcharges, or other monetary assessments with regard to the sentencing, disposition, or adjudication of a felony, misdemeanor, juvenile delinquency petition, petty offense, traffic offense, or traffic infraction." §16-11-101.6(1). The People concede that the judicial department "could issue refunds to non-exonerated defendants" from the judicial collection enhancement fund "because it is the judicial department that collects and distributes the funds." (Op. Brf. at 32.)

The People claim that "notwithstanding [the Victim Compensation Fund and the judicial collection enhancement fund], there is no mechanism for the processing of such claims, other than that accessed through a civil suit" because "a trial court loses

jurisdiction over the case upon the entry of a final judgment." (Op. Brf. at 36.) To the contrary, district courts have "ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion . . . and [conduct] a hearing if required, to enter orders resolving the matter." Hargrave, 179 P.3d at 230, citing People v. Rautenkranz, 641 P.2d 317, 318 (Colo. App. 1982). The Hargrave court ruled that there is a "significant distinction between challenging the conviction or sentence and requesting the return of property." Id. at 229. Here, Ms. Nelson is not challenging her conviction or sentence, but instead is requesting a refund of the fines she previously paid. Thus, the district court has ancillary jurisdiction to order a refund of previously paid costs, fees, and restitution after her acquittal upon retrial.

Furthermore, the People claim that Hargrave is factually distinguishable from the current case because "even when [Ms. Nelson] was acquitted upon retrial, she was not the rightful owner of the funds because the acquittal was not determinative of her restitution obligation." (Op. Brf. at 41.) This argument is without merit. It is indisputable that Ms. Nelson's acquittal upon retrial vacated her restitution obligation, thus making her the rightful owner of any restitution funds she wrongfully paid.

Where no published Colorado appellate decisions have addressed the issues raised in this matter, but other jurisdictions have addressed these issues, the Court of Appeals in this case properly followed other jurisdictions in holding that Ms. Nelson is entitled to seek, and the district court is authorized to award, a refund of the fees, costs, and restitution that Ms.

Nelson paid in connection with her overturned conviction. In general, the executive branch is responsible for the refund of costs and fees, while both the executive branch and the judicial branch could be responsible for the refund of restitution. Thus, this Supreme Court should affirm the Court of Appeals' opinion in this matter.

CONCLUSION

The district court had jurisdiction to order a refund of costs, fees, and restitution from the State based upon Ms. Nelson's post-conviction motion following her acquittal, and the executive branch should refund her costs and fees payments, as well as her restitution payments because restitution was paid through the Victim Compensation Fund. The Court of Appeals' reasoning and conclusion in this case are legally sound; therefore this Supreme Court should affirm the Court of Appeals' decision.

Respectfully submitted this 8th day of December, 2014.

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APPENDIX 3

COURT OF APPEALS,
STATE OF COLORADO

101 West Colfax Avenue, Suite 800
Denver, Colorado 80202
La Plata District Court
Honorable Jeffrey R. Wilson, Judge
Case Number 2000CR76

Case Number: 09CA2081

[Filed June 29, 2011]

THE PEOPLE OF THE STATE OF COLORADO	)
Plaintiff-Appellee	)
v.	)
Louis Madden	)
Defendant-Appellant	)

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OPENING BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

This case presents an issue of first impression in Colorado: when a defendant's conviction is subsequently vacated and the case is dismissed, whether justice requires – as it does for funds collected on subsequently vacated civil judgment – the return of funds paid as restitution.

STATEMENT OF THE ISSUES PRESENTED

When a civil judgment is subsequently vacated, money collected on the judgment must be refunded. Federal courts have similarly held that when a defendant's conviction is subsequently vacated, refunding the restitution he has paid is required in the interests of justice.

The court vacated Mr. Madden's conviction and dismissed the case but subsequently refused to order a refund of restitution.

Did the court err by refusing to order the restitution payments refunded?

* * *

SUMMARY OF THE ARGUMENT

When a civil judgment is subsequently vacated, money collected on the judgment must be refunded. And in criminal cases, federal courts have similarly held that when a defendant's conviction is subsequently vacated, refunding the restitution he has

paid is required in the interests of justice. The same result should obtain here.

ARGUMENT

Because the court vacated the conviction and dismissed the case, the interests of justice required refund of Mr. Madden's restitution payments.

Standard of Review

This issue is preserved for review because Mr. Madden litigated his claim for a refund of the restitution in the trial court. (vII p345-346; v4.13.09 p 2-4). As stated in the introduction, this case presents an issue of first impression in Colorado. Because the underlying facts are uncontroverted and the issue involves a pure legal determination, logic suggests this Court should review the issue de novo. *Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000) (appellate courts review pure questions of law *de novo*) *citing People v. Romero*, 953 P.2d 550, 555 (Colo. 1998); *c.f. Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008) (equity decisions by lower court are reviewed de novo by appellate court); see also *Schaefer v. Schaefer*, 795 N.W.2d 494, 497 (Ia. 2011) (same).

Law and Analysis

This case appears to present an issue of first impression in Colorado: whether money collected under a restitution order in a criminal case should be refunded to the defendant when the basis for the restitution order – the criminal conviction – is vacated and the case is dismissed.

It is abundantly well-settled that when a civil judgment is reversed on appeal or by a post-judgment order, that any money paid in connection with the judgment must be refunded. *E.g., P.B. v. T.D.*, 561 N.E.2d 749,751 (Ind. 1990) ("When a party to an action pays a judgment that is later reversed on appeal, that party is entitled to restitution."); *Century Bank v. Hymans*, 905 P.2d 722, 726-727 (N.M.App. 1995) ("When a party pays a judgment and the judgment is then reversed or modified on appeal or by post-judgment order, the payor can obtain restitution without bringing a new action; it may move the trial or appellate court for relief, or the court may grant relief of its own initiative."); *West Suburban Bank v. Lattemann*, 674 N.E.2d 149, 151 (Ill.App. 1996) ("Upon the reversal of a judgment, a party that has received benefits from the erroneous judgment must make restitution."); *Moore v. Baugh*, 308 N.W.2d 698, 700 (Mich.App. 1981) ("[W]hen a judgment is reversed or set aside, the party who has received the benefit must make restitution to the other party.") citing 5 Am.Jur.2d, Appeal and Error, § 997, p. 424; *Spangler Inc. v. House of Heavilin, Inc.*, 394 S.W.2d 561 (Mo.App. 1965) (subsequent reversal of judgment destroyed basis upon which garnishment issued and entitled defendant to restitution regardless of merits of plaintiff's original claim, or fact that garnishor had made collection before reversal).

This well-settled principle of equity appears to be the rule in Colorado, as well. *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo.App. 1993) (observing that " . . .a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution. . .").

In *United States v. Venneri*[1], after the defendant's conviction was vacated (because it was based upon a statute determined to be unconstitutional), the court invoked the All Writs Act to order the victim to refund all the money it received from the defendant as restitution.[2] The Court held that justice compelled this

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[1] *United States v. Venneri*, 782 F.Supp. 1091, 1093 (D Md. 1991).

[2] The All Writs Act authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Venneri*, 782 F.Supp. at 1094, quoting 28 U.S.C. § 1651 (a). Thus, the court held that, notwithstanding the lack of a statute applicable to this "extraordinary case", it had the authority to order the victim to refund the restitution it had received under the now void order.

Colorado, of course, has its own "All Writs Act." § 13-1-115, C.R.S. The statute provides courts with the "power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state." In this situation, the applicable writ might be a "writ of debt" or a "writ of restitution", the latter being "A writ which lies after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment." *Black's Law Dictionary*, 1611 (6th Ed. 1990).

Moreover, this Court has suggested that a claim for a refund of restitution already paid – although not, as here, based on dismissal of the case, but on a claim that the restitution order was illegal – is a cognizable claim under Crim. P. 35(a). *People v. Suttmiller*, 240 P.3d 504, 507 (Colo.App. 2010).

Two analogous situations are instructive, as well. *Cf. People v. Hargrave*, 179 P.3d 226, 228 (Colo. App. 2007) (holding that when the need for property seized in connection with a criminal prosecution has ended the trial court "has the jurisdiction *and the obligation* to order its return.") (emphasis added) and *Yording v. Walker*, 688 P.2d 788, 791 (Colo. 1984) (trial court's inherent

result and remedy, in spite of the legislative failure to address this circumstance.

> Despite the abundance of statutory procedures and guidelines in existence to govern the process of convicting and sentencing a defendant, no thought appears to have been given to the possibility that, in an imperfect criminal justice system, some defendants might be convicted wrongly and some sentences might be overturned or vacated. Despite that dearth of statutory authority, it remains indisputable that Marriott must repay the petitioner. Venneri paid money to Marriott as a consequence of an unconstitutional conviction, and principles of justice require no less than a full refund of that money.

Venneri, 782 F.Supp. at 1094-1095

Thus, the court held that when a defendant's conviction is vacated in a post-conviction action, "[t]he interests of justice make it imperative that the [defendant] receive a refund of his restitution." *Venneri*, 782 F.Supp. at 1093; *see also United States v. Hayes*, 385 F.3d 1226, 1229 (9th Cir. 2004) ("[A] wrongly convicted defendant whose sentence has been vacated may seek monies paid pursuant to a wrongful conviction."); *Telink v. United States*, 24 F.3d 42, 46-47 (9th Cir. 1994) (holding that "incident to the vacating

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authority "necessarily includes the authority to correct errors of law made during the course of such proceedings" and, thus, court had the authority to order a refund to defendant of his "premium payment made to the surety as a result of the trial court's erroneous grant of bail.").

and setting aside of the wrongful conviction" fines and restitution paid "would be automatically refunded, without requiring a civil action. . .").

Principles of justice and equity suggest the same result should obtain here. Just as money paid on a subsequently reversed civil judgment must be refunded, so should the restitution collected by virtue of a criminal conviction that is subsequently reversed and the case is dismissed.

CONCLUSION

For reasons stated and authorities cited, this Court should reverse the district court's ruling and remand this case with instructions to the district court to order a refund of the restitution paid by Mr. Madden.

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APPENDIX 4

SUPREME COURT,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Certiorari to the Colorado Court of Appeals
Case No. 2009CA2081
Case Number: 2013SC496

[Filed December 3, 2014]

THE PEOPLE OF THE STATE OF COLORADO	)
Petitioner	)
v.	)
LOUIS A. MADDEN	)
Respondent	)

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ANSWER BRIEF

ISSUE ANNOUNCED BY THE COURT

Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him?

* * *

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that if a defendant's conviction is finally vacated, the district court has jurisdiction to refund the restitution he paid as part of his sentence. In so doing, the district court is exercising the jurisdiction over criminal cases conferred by the Colorado Constitution and both its inherent and statutory authority to exercise its constitutionally conferred jurisdiction.

To the extent that the Court addresses the issue, Colorado statutes suggest several funded entities who could repay Mr. Madden the $757.75 he paid for restitution as part of his sentence for the now vacated conviction.

And nothing about the General Assembly's creation of a cause of action awarding a range of benefits to "exonerated" defendants has any bearing on the question presented on certiorari.

ARGUMENT

1. Consistent with the restitution statute, other courts that have addressed the issue, common sense, and the interests of justice, the Court of Appeals correctly held that because Mr. Madden's convictions were finally vacated, the district court has jurisdiction to order return of the $757.75 he paid as part of the sentence for those now vacated convictions.

In this case and in the companion case of *People v. Nelson*, 2013 COA 58, 2013 WL 1760903, the Court of Appeals held that a person who pays restitution, fines, or costs because of a criminal conviction is entitled to recover his money when the conviction is finally overturned. In so holding, the Court of Appeals concluded that because restitution must be tied to a valid conviction, when the conviction is overturned, the criminal court in the case is authorized to award a refund of the money the defendant paid in connection with the now overturned conviction. This is more than just common sense; it is the result that the interests of justice demands.

Many other courts agree. For example in *United States v. Venneri*, the court held that when a defendant's conviction is vacated in a post-conviction action, "[t]he interests of justice make it imperative that the [defendant] receive a refund of his restitution." *United States v. Venneri*, 782 F.Supp. 1091, 1093 (D.Md. 1991). Likewise in *Telink, Inc. v. United States*, the 9th Circuit explained that if the defendants succeeded in their action to set aside their convictions the restitution and fines they paid "would be

automatically refunded, without requiring a civil action...". *Telink, Inc. v. United States*, 24 F.3d 42, 46-47 (9th Cir. 1994)); *see also Commonwealth v. McKee*, 38 A.3d 879 (Pa.Super. 2012) (after defendant's conviction overturned on appeal, trial court had jurisdiction to order refund of fines, costs, and restitution paid by defendant); *United States v. Beckner*, 16 F.Supp.2d 677, 679 (M.D.La. 1998) (court had jurisdiction to order government to repay defendant's funds that it disbursed as restitution after defendant's conviction vacated).

And consistent with this reasoning, the 5th Circuit has held the same with respect to refunding money paid as fines in connection with a conviction that is later vacated. *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973). Similarly, when, because of a due process violation, this Court reversed a defendant's conviction, it ordered a refund of the money he paid in fines and costs. *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961).

As the Court of Appeals held in this case, principles of justice and equity require the same result here.

2. The Colorado Constitution granted the district court jurisdiction over this criminal case and both § 13-1-115, C.R.S. and the district court's inherent authority to carry out its jurisdictional mandate provide authority to order a refund of restitution when a criminal conviction is vacated.

The question on which this Court granted certiorari is whether the criminal court has jurisdiction to order

the refund of his restitution now that his conviction has been finally vacated. To the extent that the State's brief addresses this specific question, the State claims that the district court lacked jurisdiction to do so because the General Assembly did not expressly authorize it in a statute. OB at 16-21. As support the State primarily cites two inapposite cases – one concerning a civil forfeiture action[1], the other a district court ordering payment of attorney's fees as a sanction for a discovery violation.[2] The State's claim that a broad principle – "absent statutory authority, a district court lacks jurisdiction to order the return of funds" OB at 14 – derives from the narrow statute-bound holdings in these cases does not withstand even minimal scrutiny.

The holding in *$11,200.00 Currency* turned entirely on this Court's interpretation of the public nuisance statute, § 16-13-301 et. seq., C.R.S. The public nuisance statute deals with a special procedure to deem certain property a public nuisance and ordering its forfeiture. Because of various provisions specific to the "specialized trial court proceeding" authorized by the public nuisance statute, this Court held that the statute's provision for return of the forfeited property applied only upon dismissal of the criminal case at the trial stage and not if the criminal case is dismissed after appeal. *11,200.00 Currency*, 313 P.3d at 558. This Court's analysis, all of it specific to the public nuisance statute, has no bearing on the issue presented here.

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[1] OB at 14 citing *People v. $11,200.00 U.S. Currency*, 313 P.3d 554 (Colo. 2013).

[2] OB at 15 citing *People v. District Court*, 808 P.2d 831 (Colo. 1991).

Nor does this case stand for the broad principle claimed for it by the State in its brief.

Nor does *People v. District Court* provide any guidance. This Court's holding there was specific to Crim. P. 16 and whether it allowed a court to award attorney's fees as a punitive sanction for a discovery violation. *District Court*, 808 P.2d at 836. This Court did not lay down any broad principle that would offer any guidance here.

In short, neither case has anything to say about the district court's jurisdiction to return restitution Mr. Madden was ordered to pay as part of his sentence for criminal convictions that were ultimately deemed invalid.

That question is fairly simple to answer. The subject matter jurisdiction of the Colorado district court is conferred by the Colorado Constitution, not by the General Assembly. COLO. CONST., Art. VI, §9. In relevant part, that constitutional provision confers "original jurisdiction in all . . . criminal cases, except as otherwise provided herein . . .". Mr. Madden paid the restitution as a result of the district court's exercise of that very subject matter jurisdiction conferred by the Colorado Constitution: He paid $757.75 as part of the sentence imposed in his criminal case. Section 18-1.3-603 (1), C.R.S. (providing that every felony conviction shall include an order regarding restitution). And as the Court of Appeals held here and in the companion case, it is an appropriate exercise of that jurisdiction for the district court to refund restitution paid when the conviction to which it was tied is subsequently vacated.

Indeed there is ample statutory authority empowering the district court to do just that.

First, in connection with the constitutional grant of subject matter jurisdiction over criminal cases, the General Assembly has empowered the district courts to issue writs as necessary for the complete exercise of its jurisdiction.

> **Courts may issue proper writs.** The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state.

Section 13-1-115, C.R.S.; *see also People v. Hamilton*, 666 P.2d 152, 159 (Colo. 1983) (Quinn, J. concurring) (citing this statute and noting "the long-recognized principle that courts retain the power to issue warrants and other writs in connection with matters over which they have jurisdiction."); *In re People ex rel. B.C.*, 981 P.2d 145, 149 (Colo. 1998) (same).

A proper writ here to refund the money Mr. Madden paid would be a "writ of restitution", which is "[a] writ which lies after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment." *Black's Law Dictionary*, 1611 (6th Ed. 1990). A writ to restore to Mr. Madden the money he paid "by occasion of the judgment" tracks this Court's holding in *Toland*. In that case this Court held that when a conviction is vacated, the parties should be "placed in *status quo* by refund to the defendant of the sums paid as fine and costs." *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (vacating judgment of conviction for DUI entered by lower court in violation of defendant's due

process rights and ordering refund of the money that defendant paid as fines and costs).

Indeed, the federal court in *United States v. Venneri* invoked the federal counterpart to §13-1-115 – the All Writs Act[3] – to order refund of money paid by the defendant after his conviction was vacated as a result of his post-conviction petition. *United States v. Venneri*, 782 F.Supp. 1091, 1093 (D.Md. 1991). Because, like here, the situation was not otherwise covered by statute, the Court held that the All Writs Act authorized the court to order refund of the restitution paid by the defendant; a refund that the interests of justice made "imperative." *Venneri*, 782 F.Supp. at 1093. Indeed, the Court held that despite the "dearth of statutory authority . . . principles of justice require no less than a full refund of that money." *Id.* 782 F. Supp. at 1094-95.

Other federal courts as well have relied on the All Writs Act as authority requiring the government to refund restitution paid by a defendant when his conviction is subsequently vacated, even if the funds have been disbursed. *United States v. Beckner*, 16 F.Supp.2d 677 (M.D. La. 1998). Like the Court of Appeals here, the *Beckner* court found the reasoning of the 5th Circuit regarding refund of fines paid in connection with a subsequently vacated conviction persuasive. *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of

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[3] 28 U.S.C. § 1651 (a) authorizing courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

actions in order to obtain reimbursement of money to which he is entitled. Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines.").

In *Beckner*, *Venneri*, and *Lewis*, the government argued, just like the State here, that the court lacked "jurisdiction" to refund the money because of the lack of any statute specifically addressing refund. The courts all squarely rejected that argument, the former two relying on the federal counterpart to § 13-1-115, and the 5th Circuit in *Lewis* simply relying on the court's inherent authority:

> The Government says that the appellants cannot recover in any event or by any existing remedial procedure because there is no express statutory authority for such relief. Just as the imposition of a fine is an incident of a criminal conviction, so is the direction for repayment an incident to the vacating and setting aside of the conviction.

United States v. Lewis, 478 F.2d at 836.

This Court, as well, has relied on the district court's inherent authority to order a surety to refund money to a defendant even though there was no specific statutory authority to do so. *Yording v. Walker*, 688 P.2d 788, 791 (Colo. 1984). In so holding, this Court held that the district court's inherent authority "necessarily includes the authority to correct errors of law" made during a criminal prosecution. Thus, because the court's error of law caused the defendant to pay the surety, it could correct its error by ordering a

refund. *Id.*, *see also Cooper v. Gordon*, 389 So.2d 318, 319 (Fla. App. 1980) (after defendant's conviction reversed on appeal, court retained jurisdiction to refund restitution and fines paid by defendant "as part of its inherent power to correct the effects of its own wrongdoing and restore [defendant] to the status quo ante.").

It is this same inherent power that the Court of Appeals cited in *Hargrave*, holding that the district court had ancillary jurisdiction to hear and rule on the defendant's motion for return of property seized (but no longer needed) in connection with a criminal prosecution. *People v. Hargrave*, 179 P.3d 226, 230-12 231 (Colo. App. 2007) (also cited with approval in the companion case, *People v. Nelson*, *supra*.). And that inherent power also included the authority to, if necessary, order payment to the defendant of the storage charges he would have to pay in retrieving his seized property. *Id.*

Moreover, at least one other division of the Court of Appeals has held that a motion for a refund of restitution is a cognizable postconviction claim under Crim. P. 35(a). *People v. Suttmiller*, 240 P.3d 504, 507 (Colo. App. 2010) (so holding because restitution is part of the sentence and therefore a claim for a refund is a challenge to the legality of the sentence). Indeed, holding this to be a cognizable postconviction 35(a) claim logically follows from this Court's holding in *Roberts v. People*, 130 P.3d 1005 (Colo. 2006) (by asserting claim that court could not award prejudgment interest as part of its restitution order, defendant presented an issue as to the legality of his sentence).

Roberts is also instructive in that this Court held that the district court had the authority to set the pre-judgment interest rate for its restitution award, even though the restitution statute had no provision granting authority to do so. *Roberts*, 130 P.3d at 1010. The district court can do so even without specific statutory authority because "[r]estitution in a criminal case is part of the sentencing process." *Id.* From this reasoning it follows that the district court needs no specific statutory authority (beyond that discussed above) to order a restitution refund, as well.

Finally, as cited by the Court of Appeals in the companion case to this one, resolving this claim in same criminal case is consistent with Crim. P. 57(b) which provides that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists." *People v. Nelson*, *supra*, quoting Crim. P. 57(b). This Rule's reference to civil rules is notable, in that it is well-settled that when a civil judgment is reversed on appeal or by a post-judgment order, any money paid in connection with the judgment must be refunded in the same case without requiring a separate action. *E.g.*, *Century Bank v. Hymans*, 905 P.2d 722, 726-727 (N.M.App. 1995) ("When a party pays a judgment and the judgment is then reversed or modified on appeal or by post-judgment order, the payor can obtain restitution without bringing a new action; it may move the trial or appellate court for relief, or the court may grant relief

of its own initiative."); *P.B. v. T.D.*, 561 N.E.2d 749, 751 (Ind. 1990) (same); *West Suburban Bank v. Lattemann*, 674 N.E.2d 149, 151 (Ill.App. 1996)(same); *Moore v. Baugh*, 308 N.W.2d 698, 700 (Mich.App. 1981) (same); *Spangler Inc. v. House of Heavilin, Inc.*, 394 S.W.2d 561 (Mo.App. 1965) (same); *see also Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo.App. 1993) (observing that ". . .a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution. . ."). Thus, ordering return of the money paid here is also consistent with the restitution order's initial status as a civil judgment in favor of the state.[4]

In sum, a district court has jurisdiction over this restitution issue and the concomitant authority to order restitution refunded when the defendant's conviction is vacated. The court's subject matter jurisdiction over criminal cases derives from the Colorado Constitution. By refunding the restitution paid – whether under its inherent authority, or by issuing a writ under § 13-1-115 – the court is simply exercising its constitutional grant of subject matter jurisdiction.

And because the district court has this authority as a proper exercise of its constitutionally-conferred subject matter jurisdiction, the State's claim of a violation of the separation of powers doctrine – OB at 19-21 – is baseless. The district court has both the constitutional and statutory authority as well as the inherent power in furtherance of exercising its jurisdiction to return Mr. Madden's money. COLO.

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[4] § 18-1.3-603 (4)(a), C.R.S.

CONST., Art. VI, §9; § 13-1-115, C.R.S.; *People v. Hamilton, supra*.

Moreover, to the extent the State bases this "separation of powers" argument on § 13-65-101 et. seq. its argument fails. For reasons stated in Argument 3 *infra*, this statute has nothing to do with the issue presented. Nowhere in the statute does the General Assembly say that only an "exonerated person" can recover his restitution. Nor has the General Assembly declared that this statutory cause of action is the exclusive means by which to do so.

3. The General Assembly's creation of a cause of action providing a wide range of compensatory damages to defendants who can prove "actual innocence," neither established exclusive means for a defendant to recoup the restitution he or she paid nor does it show legislative intent to deny refunding restitution to other defendants whose conviction is finally vacated.

The State hinges much of its argument on the fact that the General Assembly enacted legislation in 2013 creating a civil action for persons who were convicted of a felony to seek a range of compensation if he or she can prove "actual innocence" in a special civil action. OB at 11-13 citing § 13-65-101 et. seq., C.R.S. Because the several types of compensation provided for in this statutorily-created cause of action incidentally includes the restitution paid by the exonerated person, the State claims we can "presume" that the General Assembly therefore intends to deny refund of restitution to anyone else. This is nonsense.

The statute provides for a broad range of compensation to such person, including, *inter alia*, college tuition waivers for the person and his children, compensation for child support owed during incarceration, and $70,000.00 for each year of incarceration. Section 13-65-103, C.R.S. The statute says nothing about others whose convictions are vacated on appeal or otherwise. Indeed, nowhere in the statute is there a legislative mandate restricting even the exonerated person from seeking a refund of his restitution in the same criminal case. Nor does the statute state it is the exclusive remedy available. *C.f. Vaughn v. McMinn*, 945 P.2d 404, 408 (Colo. 1997) (By enacting statute raising the penalty for a bad faith cause of action, legislature did not directly state or imply that award of penalty to injured claimant precludes common law bad faith claim; absent an explicit legislative mandate restricting claimant to the statutory penalty, the statute does not restrict claimant's means of redress). The existence of a statute awarding compensation (that happens to include restitution) to a certain class of people with vacated convictions does not restrict recovery of restitution by others with vacated convictions. If the General Assembly so intended, it would expressly say so. But it did not. The statute neither says this is the exclusive class of people entitled to recover restitution nor does it say this is the exclusive means of recovering it. And because the statute has no such language the State's "legislative intent" argument fails. *Compare Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70 (Colo. 1998) (creation of a statutory remedy does not bar preexisting common law rights of action, in absence of clear legislative intent to negate common law right); *Vaughn v. McMinn*, 945 P.2d 404 (Colo. 1997) (General

Assembly's creation of statutory remedy does not bar pre-existing common law rights of action unless legislature expressed its intent to do so); *Brooke v. Restaurant Services, Inc.* 906 P.2d 66 (Colo. 1995) (creation of a private right of action by state statute does not bar pre-existing common-law rights of action unless legislature expressed its intent to do so); *Collard v. Hohnstein*, 174 P. 596 (Colo. 1918) (A remedy provided by one statute does not abolish that given by another or by the common law, unless specifically so provided); *Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47, 52-53 (Colo. 2001) ("Nothing in the UCDPA indicates that it is intended to be the exclusive remedy for deceptive trade practices. . .); *with Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004) ("express, unambiguous language of subsection (2) of Colorado's premises liability statute" that uses the language "any civil action brought against a landowner by a person who alleges injury while on the real property of another" shows General Assembly's intent to completely occupy the field and supersede existing law) and *Build It and They Will Drink, Inc. v. Stauch*, 253 P.3d 302 (Colo. 2011) (dram shop statute provides exclusive remedy because it states "this section shall be interpreted so that any common law cause of action against a vendor of alcohol beverages is abolished").

Moreover, to the extent that the statute manifests a legislative intent to draw a distinction between those convictions vacated for the limited reasons covered by the statute and convictions vacated for all other reasons – OB at 12 – it manifests that distinction by its providing an extensive range of compensation well beyond just a restitution refund for the persons in the former category. Indeed, providing a refund of

restitution is an incidental part of the statute's broad provisions of compensatory awards.

For example, consider the "legislative intent" claims the State makes for § 13-65-101 in the context of some other statutorily created causes of action. By creating a cause of action for treble damages against a landlord, does the Security Deposit Act[5] evince a legislative intent that only a tenant who can establish the statute's specified circumstances can recover the amount of the security deposit money held by his landlord? Or by creating an action for certain enhanced damage awards against an employer does the Wage Claim Statute[6] evince a legislative intent that only an employee who can establish the statute's specified circumstances can recover the principal amount of wages owed to her? Does the Motor Vehicle Repair Act[7] by creating an action for treble damages against a car mechanic evince a legislative intent that only a customer who can establish he overpaid for repairs in one of the ways prohibited by the statute can recover

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[5] § 38-12-103, C.R.S. (establishing a cause of action for an award of three times the amount of the security deposit plus attorney's fees if the landlord fails to specify reasons for retaining a tenant's security deposit within a specified time period, and fails to return it after a 7 day notice of intent to sue).

[6] § 8-4-109, C.R.S. (establishing a cause of action for an award of wages owed, plus an additional percentage if the employer refuses to pay wages owed after a written demand and if his failure to pay is willful).

[7] § 42-9-113 and 42-9-111, C.R.S. (establishing a cause of action for, *inter alia*, an award of three times the amount of the customer's payment for repairs in excess of the amount allowed by the statute after a 10 day demand for damages sent by certified mail).

his money? No, these statutes evince no such legislative intent. Like § 13-65-101, each of these special causes of action created by statute simply evinces a legislative intent to award a broader range of compensation to tenants, employees, customers, or criminal defendants who are situated in the particular circumstances specified therein. These statutes neither provide the exclusive means to recover the principal amount at issue in each circumstance – i.e. money representing the deposit, the wages, the repair bill, or the restitution – nor do they evince a legislative intent to deny recovery of the principal amount to all who are not so situated.

In short, the existence of this statute creating a special cause of action has nothing to do with the issue presented for review.

4. To the extent that this Court addresses a matter that is not within the scope of the issue on which this Court granted certiorari in this case, several statutes suggest state agencies or entities that could be ordered to refund the $757.75 Mr. Madden paid as restitution and that have funds allocated from the General Assembly to do so.

The remainder of the State's brief – OB at 22-49 – argues about who must return Mr. Madden's money to him. The Court of Appeals' decision here, suggested that such a refund could come from "the state." Slip op. at 1. (citing *Nelson*, *supra*). The Court of Appeals did not specify which entity of the State should reimburse Mr. Madden or if the burden should fall on the judicial branch, the executive branch some other sub-agency of

either. These are all matters beyond the scope of the question on certiorari in this case. That question asks only if the district court had jurisdiction to order refund restitution paid, now that Mr. Madden does not stand convicted in the case in which he was ordered to pay it.

But to any extent that this Court addresses this issue in this case, several options make sense. First, when criminal charges are brought to trial but do not result in a conviction § 16-18-101 provides that costs "shall be paid by the state pursuant to section 13-3-104, C.R.S." And § 13-3-104 provides, in turn, that the State "shall provide funds" for, *inter alia*, "the operations . . . and other expenses of all court of record within the state. . .". Thus, although specific to "costs", this statutory scheme suggests the principle that when no valid conviction results from a criminal prosecution that the funds expended should be borne by "the state." And, second, these statutes provide the judiciary with the funds necessary to bear that expense as part of the court's "operations" or "other expenses."

Additionally, defendants who are unable to pay restitution immediately upon conviction pay through the "collections investigator" – and thus must additionally pay the "time payment fee".[8] Section 16-18.5-104 (1) and (2), C.R.S. These fees are credited to

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[8] If, as the State suggests, a defendant whose conviction is vacated can only have the remainder owed for restitution vacated prospectively – OB at 13-14 – a defendant who paid restitution in full upon conviction would get no relief when his conviction is vacated but one who had a time payment plan would be relieved of the unpaid balance. If there is an equitable or even rational reason for this disparate treatment of the two, the State does not suggest what that may be.

"the judicial collection enhancement fund"; a fund that is created by statute in the state treasury. Section 16-11-101.6 (2), C.R.S. By statute, the General Assembly must fund the judicial department for, *inter alia*, "administrative . . . costs incurred in collecting restitution, fines, costs, fees and other monetary assessments." *Id.* Moreover, the statute provides for all funds so allocated by the General Assembly to, at the end of the fiscal year, "remain in the fund for appropriation to the judicial department for, *inter alia*, "ongoing enforcement and collection of restitution, fines, fees, costs surcharges, and *any other monetary assessments*." *Id.* (emphasis added). This also suggests an appropriately funded entity to bear responsibility for returning the money paid by Mr. Madden as restitution.

These are among the funded state agencies and entities that the district court could order to return Mr. Madden's $757.75 in restitution.

Finally, the State's complaint about lack of "procedures" for "processing refunds of restitution" has no bearing on the issue before this Court. OB at 34-35. Any perceived difficulty neither divests the court of jurisdiction nor prevents it from ordering a refund. *C.f Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (courts have flexibility to shape equitable remedies); *Garrett v. Arrowhead*, 826 P.2d 850, 855 (Colo. 1992) ("The purpose of a court sitting in equity is to promote and achieve justice with some degree of flexibility."). Indeed, the flexibility that equity affords "extends to conditions as they are at the close of litigation" and allows courts to "see the litigation through in such manner as would achieve full justice." *Meredith v.*

Ramsdell, 384 P.2d 941, 945 (Colo. 1963). Any difficulty with "processing refunds" should not thwart the result that justice requires and that the district court has the constitutional authority to achieve.

CONCLUSION

For reasons stated, Mr. Madden respectfully requests this Court affirm the judgment of the Court of Appeals.

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RECORD AND BRIEFS

No. 15-1256

Supreme Court, U.S.
FILED
AUG 18 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A party who has paid money pursuant to a judgment has always been entitled to a refund when that judgment is reversed. Pet. 16-19. Now, however, Colorado seeks to abrogate this traditional rule. The state, taking full advantage of an inartfully drafted 2013 statute (*see* Br. of Amicus CCDB), refuses to refund money it has collected pursuant to criminal convictions when those convictions are reversed. It is hard to imagine a more egregious violation of the Due Process Clause. The state is quite literally depriving its citizens of property—property that belongs to *them*, not to the state—without due process.

In its Brief in Opposition, Colorado does not argue that this money belongs to the state, or even that the state has any interest in keeping the money. Rather, Colorado argues that the Question Presented was not adequately addressed by the court below (BIO 6-10), that Colorado is not the only state that refuses to refund money in this situation (BIO 11-16), and that the sums of money at issue are not properly called "penalties" (BIO 17-22). The first two of these claims are incorrect. The third is simply irrelevant.

I. The Question Presented was thoroughly addressed by the Colorado Supreme Court.

Both the majority and the dissent in the Colorado Supreme Court thoroughly addressed the Question Presented. The majority did so in a section of its opinion titled "No Due Process Violation." Pet. App. 20a. As the majority explained, "Nelson argued that,

upon her acquittal, due process required an automatic refund of costs and fees that she had paid." Pet. App. 20a. The majority rejected this argument, using words that could not have been any plainer: "We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted." Pet. App. 20a.

The majority then spent four more paragraphs spelling out the reasoning for its conclusion. First, the majority noted that due process requires, at minimum, notice and the opportunity for a meaningful hearing. Pet. App. 21a. Second, the majority explained that Shannon Nelson's money was not wrongfully taken from her, because her conviction had not yet been reversed when the state took her money. Pet. App. 21a. Third, the majority reasoned that the Exoneration Act provides a process by which defendants like Nelson may seek refunds, and that Nelson did not file an action under the Exoneration Act. Pet. App. 21a-22a. Finally, the majority concluded that the Exoneration Act provides sufficient process to satisfy the Due Process Clause. Pet. App. 22a.

In his dissenting opinion, Justice Hood also thoroughly addressed this issue, in a section of his opinion titled "The Exoneration Act Is an Inadequate Remedy." Pet. App. 28a. Justice Hood observed that the Exoneration Act "is not geared toward refunds." Pet. App. 28a. He noted "the impracticability of bringing a separate civil action" to obtain refunds. Pet. App. 29a. He pointed out that the Exoneration Act provides no refunds of money withheld due to

invalid misdemeanor convictions. Pet. App. 29a n.1. He therefore disagreed with the majority's conclusion that the Exoneration Act provides sufficient process to satisfy the Due Process Clause. Pet. App. 29a.

The Question Presented was thus thoroughly addressed by the Colorado Supreme Court. That court is very unlikely to return to the issue in any future case, because both sides of the question were fully aired. No other court is likely to address this issue, because—as will be discussed below—Colorado appears to be the only state that refuses to provide refunds in this situation. In short, there are no better vehicles on the horizon.

In arguing otherwise, Colorado appears to misunderstand the Question Presented. The Question is not, as the state seems to think (BIO 6-7), whether the Exoneration Act is unconstitutional. Rather, the Question is whether it is unconstitutional for Colorado to make the Exoneration Act the exclusive remedy for defendants who seek refunds of money the state has collected pursuant to convictions that have been reversed. That money should go automatically to defendants when their convictions are reversed, just as it always has, and, so far as we can tell, just as it does in every other state.

II. The state's Brief in Opposition only confirms that Colorado appears to be the only state that does not refund payments pursuant to a conviction when the conviction is reversed.

In preparing our certiorari petition, we looked for other states that do what Colorado does, but we could not find any. Pet. 19-23. Evidently Colorado could not find any either. Despite insisting that Colorado is "not an outlier" (BIO 11), the state fails to identify any other states that refuse to refund money in the state's possession after a conviction is reversed.

As we explained in our petition (Pet. 24), and as the state correctly notes (BIO 11), there are some lower courts that have held that refunds are not required when the money at issue is restitution that the state has already disbursed to victims. Our cases involve both money retained by the state and money disbursed to victims. Of the $702.10 that Colorado owes Shannon Nelson, the state possesses $287.50 and has disbursed $414.60 in restitution to victims. Pet. 3. Of the $1,977.75 that Colorado owes Louis Madden, the state possesses $1,220 and has disbursed $757.75 in restitution to victims. Pet. 4. Our cases will allow the Court to resolve this issue in both contexts. Our view is that when a conviction is reversed, due process requires the state to refund sums that have already been disbursed to victims. Money is fungible. If a state collects an unlawful tax, the tax would have to be refunded even if the state had already spent the proceeds.

Colorado makes much (BIO 12-14) of the distinction between void and voidable judgments, but that distinction has no bearing on our issue and has played no role in any of the cases recognizing the traditional rule requiring the refund of money paid pursuant to a judgment that is reversed. Regardless of the details, when a judgment is reversed, a person who has paid money pursuant to that judgment is entitled to her money back. *See, e.g.*, *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919) ("a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby."); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established.").

III. Colorado's refusal to refund money collected from defendants pursuant to convictions—after those convictions have been reversed—violates due process, whether or not the sums of money at issue are called "penalties."

Colorado asserts (BIO 17-22) that the sums of money it refuses to refund should not be called "penalties." But it does not matter what they are called. They are charges that Colorado imposes only on people who are convicted of crimes. When convictions are reversed, the money no longer belongs to Colorado, whether it is called a "penalty" or something else.

Under state law, the money Colorado collected from Shannon Nelson and Louis Madden goes by a

variety of names, including "fees," "surcharges," "assessments," and "restitution." Pet. 2-4. The important thing, however, is not what these charges are called, but that defendants only have to pay them pursuant to a conviction. This case is *not* about the various fees that court systems impose on all litigants regardless of the outcome of a case. It is about sums of money that states collect only pursuant to a criminal conviction. When a conviction is reversed, money paid pursuant to that conviction must be refunded, just like money paid pursuant to any other judgment that is reversed.

Nor is this case about fees for which the defendant received a benefit in exchange for the money, such as fees paid for rehabilitation services actually rendered to the defendant. *Cf.* BIO 18 (citing *People v. Noel*, 134 P.3d 484, 487 (Colo. Ct. App. 2005)); Pet. 23 n.11 (citing *State v. Parker*, 872 P.2d 1041, 1049 (Utah Ct. App. 1994)). This case is about the much larger assortment of ordinary charges for which defendants receive no benefit in exchange, such as those Colorado collects, pursuant to convictions, for its Crime Victim Compensation Fund and its Victims and Witnesses Assistance and Law Enforcement Fund, as well as Colorado's "docket fee," its "time payment fee," its "sex offender surcharge," its "special advocate surcharge," its "substance abuse assessment," and several others. *See* Pet. 3-4.

The Due Process Clause does not allow Colorado to require its citizens to prove their innocence to get their own money back. Colorado may not shift its burden of proof to criminal defendants. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). If,

upon the reversal of a conviction, Colorado required defendants to prove their innocence to get out of prison, that would be an obvious deprivation of liberty without due process. This case involves the same principle as applied to property rather than liberty. When a conviction is reversed, a defendant need not prove her innocence to have her liberty or her property restored. If the state wishes to continue to deprive her of liberty or property, the Due Process Clause places the burden of proof on the state.

Nor does the Due Process Clause permit Colorado to deny a meaningful remedy for recovering money the state is wrongfully withholding. *See, e.g., Reich v. Collins*, 513 U.S. 106, 108 (1994). Colorado, correctly, does not claim that this money belongs to the state. Colorado has no interest whatsoever in preventing its citizens from getting their own money back. Yet the Exoneration Act is an illusory remedy for most defendants whose convictions have been reversed, because the amounts involved are typically too small to justify a separate civil suit, and because many defendants whose convictions are reversed will be unable to prove that they are factually innocent. The Exoneration Act provides no remedy at all for many other defendants, including misdemeanants and defendants who were not sentenced to prison.

This is an issue that affects virtually every criminal case in Colorado in which a conviction is reversed, because the state collects these charges pursuant to virtually every criminal conviction. The sums of money involved may be small to the state, but they are of great significance to defendants, many of whom are indigent. To put it bluntly, the

state is taking advantage of some of its weakest citizens, by depriving them of their property without due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

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RECORD AND BRIEFS

JUN 10 2016
OFFICE OF THE CLERK

No. 15-1256

In The
Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

AMICUS CURIAE BRIEF OF THE COLORADO CRIMINAL DEFENSE BAR IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Colorado law, the only way a defendant can recover any of the monetary penalties imposed as a result of a criminal conviction that is subsequently reversed, is to file a separate civil action against the state and prove his or her "actual innocence" by "clear and convincing evidence."

The Question Presented is whether Colorado law violates due process.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Colorado Criminal Defense Bar ("CCDB") was formed in 1979 and with over 800 members, is the largest criminal defense bar association in the State of Colorado. Our members – attorneys, paralegals and investigators in both the public and private sectors – are dedicated to the representation of criminal defendants, including the indigent.

The CCDB works to ensure that Colorado's criminal justice system embodies the principles of liberty, justice and equality. To that end, and among other things, it actively supports the adoption of policies and laws that safeguard the rights of criminal defendants. The CCDB maintains a lobbying arm that promotes the interests of its members (and their clients) in the Colorado General Assembly. In fact, the CCDB was one of the key proponents of the "Exoneration Act" that is at issue in this case. Having encouraged its enactment, the CCDB is keenly interested in seeing that the Act is applied in a way that is consistent with constitutional norms.[1]

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[1] Pursuant to Sup.Ct.R. 37.6, undersigned counsel hereby discloses that no part of this brief was authored by counsel for any party, no party or counsel made any monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than *amicus* or its members made such a monetary contribution.

All parties received 10-day notice of *amicus curiae*'s intention to file this brief. This brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

Criminal defendants seeking to obtain an award of damages under Colorado's Exoneration Act face an extraordinarily high burden: The Act requires that they prove "actual innocence" by "clear and convincing evidence." That high burden stems from the fact that the statute was designed to redress only the most extraordinary of cases. When that burden is met, the Act mandates the award of a broad range of compensatory damages and other forms of relief, including the repayment of monetary penalties imposed as a result of the conviction that is the subject of the exoneration. But the Colorado legislature understood that awards under the Act would be rare. Indeed, the General Assembly assumed that only a handful of defendants would be able to invoke the statute each year, and that even fewer – on average, *one person every five years* – would actually prevail on a claim brought under the Act.

Nonetheless, the Act constitutes the only mechanism available under Colorado law for the recovery of monetary penalties imposed in connection with a criminal conviction that is eventually reversed. As such, and while obviously well-intentioned, the Act denies the overwhelming majority of defendants – those who obtain a reversal of their convictions but are unlikely to be able to establish actual innocence by clear and convincing evidence – any realistic possibility of such a recovery. By doing so, the Act denies defendants their right to due process.

ARGUMENT

Section 13-65-101 through 103, C.R.S. (2013) (the "Exoneration Act" or "Act"), originated in the Colorado House Judiciary Committee largely in response to the case of Robert Dewey, and based upon the perception that Colorado lagged behind other states in addressing how to deal with cases like Mr. Dewey's. *Colorado House Judiciary Committee*, Hearing on HB 13-1230, March 7, 2013 at 2:40-3:00; 4:00-:10 (statements of Reps. Williams and Pabon) (hereafter cited as "House Judiciary Hearing").[2]

Mr. Dewey was convicted of murder in a Colorado state court and served eighteen years of a life sentence before being exonerated of the crime by DNA evidence. *Id.* at 2:40-:45.[3] Mr. Dewey was released from prison with only the proverbial "clothes on his back," and he found it difficult to reintegrate into society. *House Judiciary Hearing* at 1:13:07-:33 (testimony of Robert Dewey). He also found that his skills as a construction worker had become hopelessly outdated during the term of his incarceration, and work was hard to find. *Id.* at 1:22:26-23:20.

The principal sponsors of the legislation believed that the state of Colorado owed a moral responsibility to try, however inadequately, to right the injustice that had been done to Mr. Dewey and others who might

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[2] Audio link available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=3214

[3] *See also* http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3910

follow in his footsteps. *E.g. House Judiciary Hearing* at 00:55-02:13 (Rep. Williams); 4:36-5:16 (Rep. Pabon). The sponsors of the measure lauded Colorado's justice system and made clear that the Act did not seek to assign blame to anyone, but they recognized that the justice system was not infallible: Mistakes, no matter how uncommon, inevitably would be made. *Id.* at 5:19-:43 (Rep. Pabon); *Colorado House of Representatives*, April 8, 2013 at 51:00-52:39 (Rep. Pabon).[4] Thus, the sponsors argued that Colorado should join the federal government, 27 other states, and the District of Columbia, by enacting legislation designed to compensate defendants incarcerated for crimes they eventually were exonerated of. *House Judiciary Hearing* at 5:43-:50 (Rep. Pabon).

The legislation garnered widespread support. The Colorado Attorney General's Office supported it, as did the District Attorney for the Twentieth Judicial District. So too did the CCDB, the American Civil Liberties Union, and Mr. Dewey himself. *See generally id.* at 15:33-16:10 (Rep. Pabon). No individual or entity spoke in opposition to the measure.

Throughout the legislative process, the Act's supporters emphasized the limited nature of the remedy being proposed. The Act was not designed to compensate defendants "who get off on some sort of technicality," it was designed only for those who are "actually innocent." *Id.* at 16:15-:30 (Rep. Pabon). The legislation

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[4] Audio link available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=15&clip_id=3610

was "narrowly restricted" and would not apply to defendants who "are just acquitted after trial" or those "who just have their convictions reversed on appeal for some procedural or legal error." *Colorado Senate Judiciary Hearing*, Hearing on HB 13-1230, April 24, 2013 at 1:47:58-48:20 (statement Assistant Attorney General Julie Selsberg).[5] *See also Colorado House of Representatives*, April 8, 2013 at 46:15-:25 (Rep. Pabon) (explaining that the Judiciary Committee drafted the legislation to ensure that "only those that are truly innocent [would] be allowed to petition" under the Act).

Consequently, the General Assembly assumed that the probable fiscal impact of the legislation would be modest. Initially, the legislature projected that during the remainder of fiscal year 2013 and all of fiscal year 2014, thirty-seven defendants would be eligible to file a petition under the Exoneration Act, two of those petitions would go to trial, and one petitioner would obtain an award of compensation under the Act per year. *State and Local Fiscal Impact*, HB13-1230 at p. 2 (Feb. 21, 2013).[6] However, those figures were reduced in subsequent fiscal impact studies. Before any committees actually voted on the legislation, the General Assembly was operating under the assumption that in fiscal years 2013-14, eight defendants would file petitions under the Act, one case would go to trial, and one

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[5] Audio link available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=47&clip_id=3854

[6] Report available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_00.pdf

petitioner would win an award of compensation under the Act every five years. *E.g. State and Local Fiscal Impact*, HB13-1230 at p. 2 (March 26, 2013);[7] *State and Local Fiscal Impact*, HB13-1230 at p. 2 (April 22, 2013).[8]

The Attorney General of Colorado testified that in his view, the legislation would apply even more narrowly than that. According to the Attorney General's figures, between 2007 and 2012, 207 criminal convictions were reversed or vacated in Colorado. *House Judiciary Hearing* at 48:50-49:32 (statement of Attorney General John Suthers). Of those, forty-seven cases were dismissed following reversal or the defendants were acquitted after retrial (one of those events is a prerequisite to filing under the Act). *Ibid.* Thus, "it's a relatively small pool of people who [will] . . . be able to seek compensation for wrongful incarceration," and in the Attorney General's view, an even smaller pool of people who might prevail on such claims. *Ibid.* More precisely, among the forty-seven defendants eligible to even file a petition for compensation during the five-year period in question, the Attorney General opined that "none of those people are likely to be in a position to prove actual innocence." *Id.* at 51:12-:30.

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[7] Report available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_r1.pdf

[8] Report available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_r2.pdf

The House Judiciary Committee passed the legislation unanimously. *House Judiciary Hearing* at 1:57:20-:36. The measure passed the full House by a vote of 60-2,[9] and the full Senate passed the bill unanimously.[10] The Governor signed the legislation into law on June 5, 2013.[11]

The law is entitled "Compensation for Certain Exonerated Persons." As its title indicates, and the legislative history confirms, the Act's primary purpose is to compensate individuals who have been "exonerated" of crimes, meaning, "a person who has been determined . . . to be actually innocent." §13-65-101(3).

By its terms, the Act applies only to "a person who has been convicted of a felony" and only when that person has been "sentenced to a term of incarceration . . . and has served all or part of such sentence." §13-65-102(1)(a). Furthermore, "[a] petition may be filed pursuant to [the Act] only" after "a court has vacat[ed] or revers[ed] all convictions in the case" and only after the entry of "an order of dismissal of all charges" or "following an acquittal of all charges after retrial." §§13-65-102(2)(a)(I) & (II).

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[9] Link available at http://www.leg.state.co.us/CLICS/CLICS2013A/csl.nsf/BillFoldersHouse?OpenFrameSet, 3rd Reading Votes at p. 858.

[10] Link available at http://www.leg.state.co.us/CLICS/CLICS2013A/csl.nsf/BillFoldersHouse?OpenFrameSet, 3rd Reading Votes at p. 1221.

[11] Link available at http://www.leg.state.co.us/CLICS/CLICS2013A/csl.nsf/BillFoldersHouse?OpenFrameSet, History at p. 1.

If a person satisfies the prerequisites for filing a petition under the Act, he or she may file "a civil claim for relief" under the Act in the district court in the county in which the case originated, naming the state of Colorado as the respondent. §13-65-102(1)(a); §§13-65-102 (5)(a) & (b). If the government contests the petition, "the district court shall set the matter for a trial . . . at which trial the burden shall be on the petitioner to show by clear and convincing evidence that he or she is actually innocent of all crimes that are the subject of the petition." §13-65-102(6)(b). The Exoneration Act specifies that a court may not make a finding of actual innocence "merely . . . [b]ecause the court finds the evidence legally insufficient to support the petitioner's conviction," nor may a court make a finding of actual innocence "merely . . . [b]ecause the court reversed or vacated the petitioner's conviction because of a legal error unrelated to the petitioner's actual innocence. . . ." §§13-65-101(1)(b)(I) & (II).

When a petitioner proves by clear and convincing evidence that he or she is actually innocent, the Act mandates "an award of monetary compensation" in the amount of $70,000 for each year the petitioner was incarcerated, §13-65-103(3)(a), an additional $50,000 for each year he or she was incarcerated and sentenced to execution, and $25,000 for each year that he or she served on parole, on probation, or as a registered sex offender after a period of incarceration. §§13-65-103(3)(a)(I) & (II). The Act also requires that a petitioner be awarded "[c]ompensation for child support payments owed by the exonerated person that became

due during his or her incarceration or placement in state custody." §13-65-103(2)(e)(III).

Successful petitioners and certain family members are entitled to the waiver of tuition at any state institution of higher education (provided the petitioner was incarcerated for at least three years). §13-65-103(2)(e)(II)(B). An award must include the payment of reasonable attorneys' fees incurred in bringing a claim under the Act. §13-65-103(2)(e)(IV). And finally, a petitioner must be awarded "[t]he amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication." §13-65-103(2)(e)(V) (hereafter referred to as the "Monetary Penalty Provision").

Either party is entitled to appeal, but payment of compensation to a successful petitioner is not to be delayed pending appeal. §13-65-102(7)(a) & (c). Somewhat ironically, and "[i]n the event the [state] prevails in an appeal, the court may take such action as is necessary to recover the amount of any compensation awarded to the petitioner." §13-65-102(7)(d).

The Monetary Penalty Provision contained in the Exoneration Act is the only provision in Colorado law that authorizes a court to order the repayment of fines, penalties, court costs, or restitution that have been imposed upon a defendant. *People v. Nelson*, 362 P.3d 1070, 1078 (Colo.2016) ("when a defendant's conviction is overturned and she is acquitted after a new trial, the trial court may authorize a refund of costs, fees, and

restitution only pursuant to the process created in the Exoneration Act."). As such, it is the exclusive means available to defendants who seek to recover monetary penalties upon reversal of their convictions. *Ibid.* But recovery under the Monetary Penalty Provision is subject to all of the same conditions that apply to recovering any form of compensation under the Exoneration Act: The Act does not create any carve-out for those defendants who seek only the recovery of monetary penalties following the reversal of their convictions.

As such, the only way that *any* defendant can obtain a refund of monetary penalties is to bring a civil action against the state of Colorado under the Act and prove his or her actual innocence by clear and convincing evidence. For the five-year period ending in 2012, the Colorado Attorney General did not think that even a single defendant would be able to meet that burden. The General Assembly itself estimated that one defendant would be able to meet that burden, on average, every five years. Beyond that, and by its terms, criminal defendants convicted of misdemeanor offenses, or those convicted of felonies but not incarcerated, are not even eligible to file a petition under the Act.

Thus, as the only statutory authority permitting the recovery of monetary penalties imposed in connection with convictions that are eventually reversed or vacated, the Exoneration Act – while obviously well-intentioned – serves to deny many criminal defendants even the possibility of such a recovery, and it imposes an unreasonably high burden on those who are at least permitted to file a petition under the Act. In other

words, the Exoneration Act denies the overwhelming majority of criminal defendants in Colorado any practical opportunity to recover monetary penalties following the reversal of their convictions.[12]

For all of the reasons stated in Ms. Nelson's and Mr. Madden's petition for a writ of certiorari, the requirements of the Exoneration Act that must be satisfied before a defendant can obtain a refund of monetary penalties following the reversal of a conviction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[12] An informal canvassing of our members did not reveal even a single instance in which a member filed a petition under the Act seeking the recovery of monetary penalties following a reversal.

RECORD AND BRIEFS

No. 15-1256

Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

In The Supreme Court of the United States

SHANNON NELSON AND
LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ Of Certiorari To The Colorado Supreme Court

JOINT APPENDIX

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Petition For Certiorari Filed April 6, 2016
Certiorari Granted September 29, 2016

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Shannon Kay Gonser

Arapahoe County

CASE NO. 2004CR652

RELEVANT DOCKET ENTRIES

03/11/2004 Affi in Suppt-Warrantless Arr

03/11/2004 Minute Order

HADV HELD

JUDGE FELDMAN CLERK ANS

PRESENT DDA SUGIOKA DEF I/C W/PD SHIMEALL

ADVISED OF RIGHTS, NATURE OF CHARGES, POSSIBLE PENALTIES, RIGHT TO PRELIM HRG FOC SET IN DIV 204 03/16/04 8:30; MPO ENTERED AND SERVED; BOND SET 10,000 CS; COND OF BOND PTS AND RUA'S; FPOR ORDER

FLG SET SLIP

FLG MPO

FLG APPLICATION FOR CT APPTD ATTY

FLG INFO RE BOND

FLG PRETRIAL RELEASE SERVICES CONDITION OF RELEASE

FLG PRETRIAL RELEASE SERVICES BOND REPORT

03/11/2004 Hearing on Advisement 03/11/2004 10:00 AM 204

Officer: ETHAN DAVID FELDMAN Length: 1.00 Hour(s)

Status.: HELD-Hearing Held

03/16/2004 Filing Other

FELONY COMPLAINT AND INFORMATION FILED BY DISTRICT ATTORNEY

02/17/2005 Minute Order

PRELIM HRG:HELD

JUDGE:FELDMAN CLERK:ANS

PRESENT: DDA COCHRAN DEF ON BOND W/ATTY STUART

PRELIMINARY HEARING HELD: PROBABLE CAUSE HAS BEEN SHOWN AS TO COUNTS 1 THROUGH 40 EXCEPT 31,32,33,34,35,40 ARE NOT SUBJECT TO PRELIMINARY HEARING: NOTE:PARTIES AGREE THAT PRELIMINARY HEARING WAS TO COUNTS 1 THROUGH 30 AS AMENDED AND COUNTS 36 THROUGH 39 AS ADDED

DEF BOUND OVER TO DISTRICT COURT FOR ARRAIGNMENT IN DIV 402 3/28/05 10:30AM

FLG: SETTING SLIP

03/28/2005 Minute Order

ARRAIGMENT [sic]

JUDGE SMITH CLERK MR REPORTER J. SCOTT

DEFENDANT APPEARS ON BOND W/COUNSEL MARTIN STUART.

DDA BRETT COCHRAN APPEARS.

DEFENDANT PLEADS NOT GUILTY WITH SPEEDY TRIAL DATE OF SEPTEMBER 28, 2005.

TRIAL IS SET FOR AUGUST 30, 2005, AT 9:00 A.M. FOR FIVE DAYS.

TRIAL CALL IS SET FOR AUGUST 26, 2005, AT 8:15 A.M.

HEARING ON MOTIONS IS SET FOR JUEN [sic] 24, 2005, AT 8:30 A.M. FOR ONE FULL DAY.

LARGE JURY PANEL WILL BE REQUIRED.

01/03/2006 Minute Order

JURY TRIAL GONSER/NELSON

JUDGE LEONARD CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA C. SCHOBER, AMY RICHARDS, DEF (ON BOND) W/COUNSEL MARTIN STUART

PROCEEDINGS BEGAN FOR JURY SELECTION.

JURY SELECTED, JUORORS [sic] INSTRUCTED COURT WILL BEGIN TOMORROW AT 0830 AM

JURORS GIVEN INSTRUCTIONS.

01/04/2006 Minute Order

JURY TRIAL GONSER/NELSON

JUDGE LEONARD CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA C. SCHOBER, AMY RICHARDS, DEF (ON BOND) W/COUNSEL MARTIN STUART

PEOPLE CALL WITNESS

#1 – VICTIM 4

#2 – VICTIM 1

#3 – VICTIM 3

#4 – VICTIM 2

#5 – LEE GONSER

#6 – JAMIE HARBOR

COURT ADJOURNS FOR DAY. COURT TO RESUME ON 010506 AT 0830 AM

01/05/2006 Minute Order

JURY TRIAL

JUDGE LEONARD CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA C.SCHOBER, AMY RICHARDS, DEF (ON BOND) W/COUNSEL MARTIN STUART

PEOPLE CALL WITNESS

#7 – DIANA HARBOUR

#8 – MARGAREATTAE HEIL – RESEARCH/ SEXUAL VIOLENCE – DR

#9 – DR. SIROTNAK – PEDIATRIC CHILDRENS HOSPITAL

#10 – DR. JAMES FRANCE – COUNSELLOR

COURT ADJOURNS TO RESUME 010606 AT 0830

01/06/2006 Minute Order

JURY TRIAL

JUDGE LEONARD CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA C. SCOBER [sic], AMY RICHARDS, DEF (ON BOND) W/COUNSEL MARTIN STUART

PEOPLE CALL WITNESS

#11 – RONALD CARSCALLEN – CBI

#12 – JOEL MCFARLAND – SOCIAL WORKER

#13 – DET. KEN HICKS – LITTLETON PD

#14 – ANN SMITH FORENSIC INTERVIEWER – SUNGATE

WATCHED SUNGATE INTERVIEW

COURT ADJOURNS TO RESUME ON 010906 AT 0845 AM

01/09/2006 Minute Order

JURY TRIAL

JUDGE LEONARD CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA C.SCHOBER, A.RICHARDS, DEF (ON BOND) W. COUNSEL MARTIN STUART

PEOPLE RE-CALL WITNESS

#14 – ANN SMITH – SUNGATE

#15 – MICHAEL PETTINGER – ROCKY MT COMPUTER FORENSIC

#16 – CHARLES VOELMLE – SOUTHWEST COUNCELLOR [sic]

PEOPLE REST

DEFENSE CALLS WITNESS #1 – JAMIE HARBOR

DEF'S SECOND WITNESS DIDNT SHOW UP, JUDGE DISMISSES JURORS FOR DAY

COURT IS TO RESUME 011006 AT 0830 AM

01/10/2006 Minute Order

JURY TRIAL

JUDGE LEONARD CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA. C.SCHOBER, A.RICHARDS, DEF (ON BOND) W/COUNSEL M.STUART

DEFENSE CALLS WITNESS #2 – DR. KATIE THACKER – CHILD COUNSELLOR

DEFENSE RESTS

JURY GIVEN INSTRUCTIONS

DA AND DEFENSE GIVE CLOSING ARGUMENT

JURY BEGIN DELIBERATIONS.

01/11/2006 Minute Order

JURY TRIAL

JURY RESUMED DELIBERATIONS AT 0830.

JURY REQUESTED TO WATCH SUNGATE VIDEO OF [VICTIMS 4, 3, AND 2]

01/12/2006 Minute Order

JURY TRIAL

JURY BEGINS DELIBERATIONS AT 0830 AM

JURY REQUESTS TO RE-VIEW SUNGATE VIDEO OF [VICTIM 2]

01/13/2006 Minute Order

JURY TRIAL

JUDGE LEONARD-ANTRIM CLERK JSK REPORTER C.ROBINS

PRESENT: DDA RICHARDS, SCHOBER, DEF (ON BOND)W/ CONSEL [sic] M.STUART

JURY CAME BACK WITH THEIR VERDICT GUILTY TO COUNTS: 15 SEX ASSAULT ON A CHILD – POSITION OF TRUST, W/PATTERN AND FORCE, COUNT 30 AGGRAVATED INCEST W/FORCE AND AGGRAVATION, COUNTS 31,32,33 CHILD ABUSE.

DEF PLACED INTO CUSTODY. DEF SCHEDULED FOR SENTENCING ON 040606 0830 AM

01/13/2006 Sex Offender Eval Ordered

01/13/2006 PSI Ordered

04/06/2006 Minute Order

SENTENCING

JUDGE LEONARD ANTRIM CLERK JSK REPORTER T.KOEHLER

PRESENT: DDA C.SCHOBER, DET. K.HICKS, DEF IN CUSTODY W/COUNSEL M.STUART

MOTIONS: IS DEF A SEXUALLY VIOLENT PREDATOR?

DEF EXERCISED HER RIGHT NOT TO DISCUSS THE CONVICTION IN THIS CASE FOR APPEAL

JUDICIAL ORDER: WILL RESERVE RULING UNTIL THE APPEALS PROCESS HAS BEEN DETERMINED.

MOTION AS TO COUNT 15 – PATTERN OF ABUSE

JUDICIAL ORDER – DOES FIND JURY CONVICED [sic] DEF ON PATTERN OF ABUSE

MOTION REQUESTING COURT APPOINTMENT OF PUBLIC DEFENDER

JUDICIAL ORDER: GRANTED

SPEAKING ON BEHALF OF DEFENDANT:

GARRY KILTNER – STEP FATHER

AUTUMN NELSON – SISTER IN LAW

SHAUN NELSON – BROTHER

ALLEN SMITH – FRIEND

GREG SHOPNER – FIANCE

SENTENCE**********

CT 15 – SEXUAL ASSLT ON A CHILD, POSITION OF TRUST W/PATTERN: DOC 20 YRS TO LIFE MANDATORY PAROLE OF 20 YRS TO LIFE (CONCUR W/CT 30)

CT 30 – AGG INCEST W/FORCE AND AGG: DOC 20 YRS TO LIFE (CONCUR W/CT 15)

MANDATORY PAROLE OF 20 YRS TO LIFE

CT 31,32, 33 – CHILD ABUSE: JAIL 6 MONTHS (CONSEC ON EA OF THOSE 3 COUNTS)

MANDATORY REGISTRATION REQUIREMENTS

PSC FOR 85 DAYS

RESTITUTION RESERVED FOR 90 DAYS

VCMP – 125.00

VASG – 162.50

CRTX – 35.00

TIME – 25.00

FLG: ADULT RECORD

07/05/2006 Motion

FOR RESTITUTION FINDINGS AND ORDER OF JUDGEMENT W/PROPOSED ORDER

07/21/2006 Filing Other

DA RESTITUTION RECAP

08/09/2006 Review 08/08/2006 06:00 AM 402

Officer: JUSTIN MARK HANNEN

Length: 1.00 Hour(s)

Status.: HELD-Hearing Held

Note..: MTN REST

08/10/2006 Order

FOR RESTITUTION IN THE AMOUNT OF $7845.00 GRANTED.

FLG: SIGNED ORDER

Shannon Nelson

Colorado Court of Appeals

CASE NO. 2006CA1023

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
05/22/2006	Notice of Filing of Appeal
03/04/2008	Opening Brief
08/13/2008	Answer Brief
10/29/2008	Reply Brief
04/09/2009	Opinion
07/21/2009	Mandate

Shannon Kay Gonser

Arapahoe County

CASE NO. 2004CR652
(Second Trial)

07/20/2009 Minute Order (No Print)

RECEIVED CALL FROM LYNETTE AT COURT SERVICES

DOC WILL NOT RELEASE DEFT.

CASE WILL BE SET FOR A NEW TRIAL PER COURT OF APPEALS MANDATE.

SENTENCE IS SET ASIDE ON ALL COUNTS.

07/16/2010 Minute Order

PRETRIAL CONFERENCE (STATUS)

JUDGE ANTRIM RPTR: T. BOOTH CLERK: MBH

PRESENT: DDA C.ALCOCK/G.DAWSON DEFENDANT ON BOND WITH COUNSEL M.STUART

COURT ANNOUNCES THAT CASE WILL GO TO TRIAL ON 07/20/2010

THE WITNESS ISSUE THAT THE PEOPLE HAVE WITH THE UNAVAILABILITY OF TWO WITNESSES WILL BE HANDLED BY HAVING THE TRIAL CONTINUED TO TUESDAY 7/27 FOR THE ADDTIONAL [sic] WITNESS TESTIMONY WITH THE TRIAL TO WRAP UP THAT DAY

THE COURT DOES NOT HAVE ANOTHER TRIAL BEGINNING SO THERE SHOULD BE NO OTHER CONFLICTS

PARTIES ANNOUNCE READY FOR TRIAL

1 HOUR FOR VOIR DIRE WITH 20 MINUTE OPENINGS

ALTERNATE IS JUROR # 8 WHEN THE JURY IS SWORN IN

DEFENDANTS BOND IS CONTINUED TO THE FIRST DAY OF TRIAL ON 07/20/2010

07/20/2010 Minute Order

JURY TRIAL DAY ONE

JUDGE: ANTRIM CLK: AJB RPTER: S.SMITH

PRESENT: DDA G.DAWSON/C.ALCOCK; DEFT ON BOND W/ATTY M.STUART

MINUTE ORDERS ON [VICTIM 1'S] CASE WILL BE COPIED FOR BOTH SIDES.

CHILD HEARSAY ISSUES.

JURY SELECTION.

OPENING STATEMENTS.

JURY ADMONISHED AND EXCUSED.

07/20/2010 Jury Trial 07/20/2010 08:30 AM 207

Officer: MARILYN LEONARD ANTRIM

Length: 1.00 Hour(s)

Status.: HELD-Hearing Held

Note.. : 4 DAYS

07/21/2010 Minute Order

JURY TRIAL DAY 2

JUDGE: ANTRIM CLK: AJB RPTER: S.SMITH

PRESENT: DDA C.ALCOCK/G.DAWSON; DEFT ON BOND W/ATTY M.STUART

PPL CALL:

[VICTIM 2]

[VICTIM 3]

[VICTIM 1]

LEE GONSER

DIANA HARBOUR

JURY ADMONISHED AND EXCUSED FOR THE DAY.

07/22/2010 Minute Order

JURY TRIAL DAY 3

JUDGE: ANTRIM CLK: AJB RPTER: M.BACHELLER

PRESENT: DDA C.ALCOCK/G.DAWSON; DEFT ON BOND W/ATTY M.STUART

PEOPLE CALL:

[redacted], AUNT OF VICTIM

[redacted], COUSIN OF VICTIM

ANN SMITH, FORMER EMPLOYEE OF SUNGATE CENTER

PEOPLE ADMIT EXHIBIT 16, VIDEO COPY OF SUNGATE INTERVIEW WITH [VICTIM 2]

EXHIBIT 16 IS PUBLISHED TO THE JURY, VIDEO IS PLAYED IN COURT

PEOPLE ADMIT EXHIBIT 17, COPY OF SECOND SUNGATE INTERVIEW WITH [VICTIM 2]

EXHIBIT 17 IS PUBLISHED TO THE JURY, VIDEO IS PLAYED IN COURT

EXHIBITS 21, 22, 23 – PAPERWORK FROM THE SECOND INTERVIEW ARE ADMITTED AND ARE PUBLISHED TO THE JURY

JURY IS RELEASED FOR LUNCH

CASE IS RECALLED AFTER BREAK

PEOPLE CALL:

RONALD CARSCALLEN, AGENT WITH COLORADO BUREAU OF INVESTIGATION

DR. JAMES FRANTZ, PSYCHOLOGIST WHO WORKED WITH THE VICTIM

JUST [sic] IS ADMONISHED AND EXCUSED FOR THE DAY

CASE WILL COTINUE [sic] AT 1:00 PM TOMORROW AFTERNOON

07/22/2010 Jury Trial 07/21/2010 08:30 AM 207

Officer: MARILYN LEONARD ANTRIM

Length: 1.00 Hour(s)

Status.: HELD-Hearing Held

Note..: 4 DAYS

07/22/2010 Jury Trial 07/22/2010 08:30 AM 207

Officer: MARILYN LEONARD ANTRIM

Length: 1.00 Hour(s)

Status.: HELD-Hearing Held

Note..: 4 DAYS

07/23/2010 Jury Trial 07/23/2010 08:30 AM 207

Officer: MARILYN LEONARD ANTRIM

Length: 1.00 Hour(s)

Status.: HELD-Hearing Held

Note..: 4 DAYS

07/23/2010 Minute Order

JURY TRIAL DAY 4

JUDGE: ANTRIM CLK: MBH RPTER: M.BACHELLER

PRESENT: DDA C.ALCOCK/G.DAWSON; DEFT ON BOND W/ATTY M.STUART

CASE IS RECALLED FOR THE DAY AT 1:00 PM

PEOPLE CALL:

SUVI MILLER, SOCIAL WORKER

PEOPLE REQUEST TO HAVE THE WITNESS QUALIFIED AS AN EXPERT

THE DEFENSE OBJECTS

COURT QUALIFIES THE WITNESS TO TESTIFY AS AN EXPERT IN THE AREAS OF TRAUMA – BOTH PHYSICAL OR SEXUAL ABUSE – TO CHILDREN AND IDENTIFYING CHILDREN WHO HAVE EXPERIANCED [sic] TRAUMA AND THE INSTANCES OF DELAYED DISCLOSURES

THE WITNESS IS QUALIFIED AS A 701 WITNESS IN THE ABOVE AREAS, AS WELL AS THE AREA OF PARTIAL DISCLOSURE

PEOPLE CALL:

DR. ANDREW SIROTNAK, PEDIATRICIAN AND A PROFESSOR OF PEDIATRICS AT THE COLORADO SCHOOL OF MEDICINE – CHILDRENS HOSPITAL IN AURORA, CO AND A DEPARTMENT HEAD AT THE CHILDRENS HOSPITAL

COURT RULES THAT THIS WITNESS IS A 701 WITNESS AND WILL NOT BE QUALIFIED AS AN EXPERT FOR PURPOSES OF TESTIMONY IN THIS TRIAL

JURY IS ADMONISHED AND DISMISSED FOR THE DAY AT 3:15 PM

07/27/2010 Minute Order

JURY TRIAL DAY 5

JUDGE: ANTRIM CLK: MBH RPTER: S.SMITH

PRESENT: DDA C.ALCOCK/G.DAWSON; DEFT ON BOND W/ATTY M.STUART

THE COURT RECEIVED A LETTER FROM JUROR # 20, VIA COURT STAFF WHEN HE ENTERED THE JURY ROOM TODAY

THE COURT REVIEWED THE LETTER, MADE COPIES FOR THE ATTORNEYS AND CALLED THE JURY INTO COURT TO QUESTION HIM FUTHER [sic] ON THE SITUATION

JUROR # 20 FEELS THAT HE CAN STILL BE FAIR IN DETERMINING A VERDICT

THE PEOPLE ARE CONCERNED THAT JUROR # 20 MAY NOT BE ABLE TO BE COMPLETLY [sic] FAIR

DEFENSE FEELS THAT, BASED ON THE LEGAL STANDARD, JUROR # 20 STATED THAT HE COULD BE FAIR

COURT WILL ALLOW THE JUROR TO STAY ON THE CASE

PEOPLE CALL:

KENNETH HICKS, DETECTIVE WITH THE LITTLETON POLICE DEPARTMENT

PEOPLE REST THEIR CASE

JURY IS EXCUSED FOR LUNCH

DEFENSE MAKES A MOTION FOR A JUDGMENT OF ACQUITTAL

COURT HEARS ARGUMENT FROM BOTH PARTIES

COURT DENIES THE DEFENSES MOTION, CITING THAT THERE IS SUFFICIENT EVIDENCE AND THIS CASE SHOULD GO TO THE JURY TO DECIDE

****

THE CASE IS RECALLED AT 1:00 PM

DEFENDANT IS ADVISED OF HER RIGHT TO TESTIFY OR NOT

THE DEFENDANT WILL WITHHOLD THAT DECISION UNTIL AFTER THE WITNESS FOR THE DEFENSE TESTIFIES

COURT FURTHER ADVISES THE DEFENDANT AND AFTER THIS WITNESS IS CALLED, THE DEFENSE WILL EITHER CALL THE DEFENDANT TO TESTIFY, OR REST THEIR CASE DEFENSE CALLS:

JOY HEMBY, INVESTIGATOR WITH THE DISTRICT ATTORNEYS OFFICE

DEFENSE RESTS

PEOPLE HAVE NO REBUTTAL WITNESSES

COURT REVIEWS THE JURY INSTRUCTIONS WITH THE JURY

CLOSING ARGUMENTS

JURY BEGINS DELIBERATIONS AT: 4:15 PM

07/28/2010 Minute Order

JURY TRIAL DAY

JUDGE: ANTRIM CLK: AJB RPTER: S.SMITH

PRESENT: DDA C.ALCOCK/G.DAWSON; DEFT ON BOND W/ATTY M.STUART

JURY RETURNS FOR CONTINUED DELIBERATIONS AT 830 AM

JURY QUESTION 1.

JURY RETURNS VERDICT NOT GUILTY ON COUNT 1-5.

JURY EXCUSED.

07/28/2010 JTRL DISPO-NOT GUILTY

07/29 2010 Order

JUDGMENT OF ACQUITTAL BASED UPON A NOT GUILTY VERDICT ENTERED BY THE JURY AS TO ALL COUNTS. BOND IS DISCHARGED.

ORDER SIGNED BY JUDGE ANTRIM ON 07/29/2010

MOTION FOR RETURN OF PAYMENTS BY MS NELSON PRIOR TO REVERSAL OF JUDGEMENT AND ACQUITAL [sic]

05/05/2011 Minute Order

HEARING

JUDGE ANTRIM RPTR: T. BOOTH CLERK: MBH DIV 207

PRESENT: DDA G.DAWSON DEFENDANT DOES NOT APPPEAR [sic]

COUNSEL FOR THE DEFENDANT M.STUART APPEARS

DEFENDANT IS NOT ON ANY SORT OF BOND ON THIS CASE – SHE IS GOING TO COLLEGE AND HAS A FINAL SCHEDULED FOR TODAY

COUNSEL FOR THE DEFNEDANT [sic] REQUESTS HER APPEARANCE BE WAIVED FOR TODAY.

COURT HEARS ARGUMENT ON THE MOTION FOR RETURN OF PAYMENTS BY MS. NELSON PRIOR TO REVERSAL OF JUDGEMENT AND ACQUITTAL

THE PEOPLE DO NOT FEEL THERE IS A STATUTE TO SUPPORT THE COURT IN RETURNING THE MONEY AND THE COURT HAS NO AUTHORITY

TO ORDER MONEY THAT HAS ALREADY BEEN PAID TO VICTIMS TO BE RETURNED

COUNSEL FOR THE DEFENDANT ARUGES [sic] THAT WAS PAID WAS IN RESTITUTION AND COURT COSTS ORDERED IN A CASE WHERE THE VERDICT WAS LATER REVERSED AND THAT MONEY SHOULD THEN BE RETURNED

THE COURT DENIES THE DEFENSES MOTION

RULING THAT THERE IS NO AUTHORITY TO HAVE THE MONEY RETURNED AND THAT SINCE THE MONEY WAS PAID DURING A TIME THAT A CONVICTION HAD BEEN ENTERED THAT IT SHOULD HAVE BEEN PAID SINCE A CONVTION [sic] WAS IN EFFECT

05/05/2011 Order

ORDER DENYING THE MOTION FOR RETURN OF PAYMENTS

COURT DENIES THE DEFENSES MOTION AFTER HEARING ARGUMENTS IN COURT

Shannon Nelson

Colorado Court of Appeals

CASE NO. 2011CA1206
(Second Appeal)

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
06/10/2011	Notice of Appeal
10/11/2011	Opening Brief
05/21/2012	Answer Brief
06/01/2012	Reply Brief
04/25/2013	Opinion

Shannon Nelson

Colorado Supreme Court

CASE NO. 13SC495
(Second Appeal)

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
07/26/2013	Petition for Writ of Certiorari
12/23/2013	Order of Court Granting Petition for Writ of Certiorari
08/08/2014	Opening Brief
12/08/2014	Answer Brief
04/13/2015	Reply Brief
12/21/2015	Opinion
02/01/2016	Petition for Rehearing
08/08/2016	Order of Court Denying Rehearing
02/10/2016	Mandate

EIGHTEENTH JUDICIAL DISTRICT
COUNTY OF ARAPAHOE LPD CASE # **2004000723**

Book # 200400003677
Last: GONSER
First: SHANNON
Middle: KAY
DOB: [redacted] Rcvd: 03/10/2004

DETERMINATION OF PROBABLE CAUSE TO DETAIN 04CR652-402

(Completed by arresting authority)

Arrestee **SHANNON KAY GONSER** DOB [redacted]

Address [redacted] SS#(DET#) [redacted]

[redacted] Date of Arrest _____

_____ Time of Arrest _____

Arresting agency **Littleton Police Department** Phone [redacted]

Arrested for **SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST** **18-3-405.3** CRS

CHILD ABUSE **18-6-401** CRS

_____ CRS

The above person is ordered to report to court as directed by the appropriate law enforcement authorities per the following information:

Date _____ Time _____

Court Location **7325 South Potomac Englewood, CO 80112**

(Completed by Judge)

Probable Cause Determination

On this date, the court has reviewed the relevant information pertaining to the arrest of the above individual and has determined:

☒ Probable cause to believe that this person has committed a crime does exist and there is reason to detain said person pending posting of bond or further court proceedings.

☐ Probable cause to believe that this person has committed a crime has not been shown and the person is ordered released pending further court proceedings and must appear before the court as directed above.

BY THE COURT: /s/ [Illegible] 204
Judge Division

3/11/04 0825
Date Time

Original: Court File
Copy 1: Arrestee copy
Copy 2: Detention Authority copy
Copy 3: District Attorney Copy

District Court, Arapahoe County, State of Colorado
Case# :D0032004CR000652 Div/Room: 402
JUDGMENT OF CONVICTION, SENTENCE Original

The People of Colorado vs
GONSER, SHANNON KAY

DOB [redacted] SID 887493

The Defendant was sentenced on: 4/06/2006

People represented by . . . : SCHOBER,CHRISTINE

Defendant represented by: STUART, MARTIN

UPON DEFENDANT'S CONVICTION this date of: 1/13/2006

The defendant was found guilty after trial of:

Count # 15 Charge: Sex Assault/Child/Position Trust-Pattern
C.R.S # 18-3-405.3(1), (2)(b) Class: F3
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 30 Charge: INCEST/AGGRAVATED – DEFENDANT'S CHILD
C.R.S # 18-6-302(1)(a) Class: F3
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 31 Charge: Child Abuse-knowing/ reckless-bodily inj
C.R.S # 18-6-401(1)(a), (7)(a)(V) Class: Ml
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 32 Charge: CHILD ABUSE-KNOWING/ RECKLESS-BODILY INJ
C.R.S # 18-6-401(1)(a), (7)(a)(V) Class: M1

Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 33 Charge: CHILD ABUSE-KNOWING/ RECKLESS-BODILY INJ
C.R.S # 18-6-401(1)(a), (7)(a)(V) Class: M1
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006

IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to THE CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS

Department of Corrections 20.00 YRS-LF COUNT 15

CONCURRENT
WITH COUNT 30 CASE NUMBER:

Department of Corrections 20.00 YRS-LF COUNT 30

CONCURRENT
WITH COUNT 15 CASE NUMBER:

Jail 6.00 MONTHS COUNT 31

CONSECUTIVE CASE NUMBER: 652
TO COUNT 32 2004CR Arapahoe County

CONSECUTIVE CASE NUMBER: 652
TO COUNT 33 2004CR Arapahoe County

Jail 6.00 MONTHS COUNT 32

CONSECUTIVE CASE NUMBER: 652
TO COUNT 31 2004CR Arapahoe County

CONSECUTIVE CASE NUMBER: 652
TO COUNT 33 2004CR Arapahoe County

Jail 6.00 MONTHS COUNT 33

Credit for Time Served 85.00 DAYS COUNT 33

CONSECUTIVE TO COUNT 31 CASE NUMBER: 652 2004CR Arapahoe County

CONSECUTIVE TO COUNT 32 CASE NUMBER: 652 2004CR Arapahoe County

ALL JAIL SENTENCES ARE TO BE SERVED AT DOC /JSK

Plus a mandatory period of parole as required by statute.

Months on parole 0240

Court finds extraordinary aggravating circumstances.

Sex Offender Status: No SVP Finding Must Reg as SXOF

Assessed	Balance
$ 347.50	$ 347.50

THEREFORE, IT IS ORDERED the Sheriff of ARAPAHOE COUNTY shall convey the DEFENDANT to the following department TO BE RECEIVED AND KEPT ACCORDING TO LAW COLORADO STATE DEPARTMENT OF CORRECTIONS DIAGNOSTIC CENTER

ADDITIONAL REQUIREMENTS

The restraining order pursuant to C.R.S. 18-1-1001 shall remain in effect until final disposition of the action, or in the case of an appeal, until disposition of the appeal.

CT 15 & CT 30 MANDATORY PAROLE OF 20 YRS TO LIFE

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

DATE 4/11/06 NPT 4/6/06

JUDGE/
MAGISTRATE /s/ Marilyn Leonard Antrim
MARILYN LEONARD ANTRIM

[Certificate Of Sheriff Omitted]

COUNTY/DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO vs. **Defendant(s):** **SHANNON KAY GONSER**	COURT USE ONLY
Attorney: CAROL CHAMBERS, 18th Judicial District Attorney 7305 S. Potomac St., Suite 300, Centennial, CO 80112 Phone: (720) 874-8500 Atty. Reg. #: 14948	Case Number: **18004CR00652** Division/Ctrm **402**

MOTION FOR RESTITUTION FINDINGS AND ORDER OF JUDGMENT

(Filed Jul. 5, 2006)

CAROL CHAMBERS, District Attorney in and for the Eighteenth Judicial District, by and through her duly appointed Deputy District Attorney, respectfully requests this Court impose restitution as a provision of the defendant's sentence. As grounds therefore, the People state the following:

1. On April 6, 2006, defendant was found guilty of Sexual Assault on a Child-Position of Trust, (Count 15) Section 18-3-405.3(1)(2)(b), C.R.S. and was sentenced to 20 years to Life, Department of Corrections, mandatory parole of 20 years to Life. Defendant was also found guilty of Aggravated Incest, (Count 30) Section 18-6-302(1)(a), C.R.S. and sentenced to 20 years to Life, Department of Corrections, mandatory parole of 20 years to Life, concurrent to Count 15. Defendant also was found guilty of Child Abuse (Counts 31, 32, 33) and was sentenced to 6 months County Jail, with 85 days presentence confinement credit, consecutive with each of Counts 31, 32, 33. Defendant to comply with mandatory restitution requirements. The Court reserved restitution for 90 days and ordered defendant to pay surcharges and costs.

2. The People have now determined the restitution amount to be $ 7,845.00 based on documentation provided by the victims' father and his contractors. That documentation is attached to this motion.

3. Specifically, the People seek restitution for:

Exhibit 1	$2,090.00
Lee Gonser	(Victim #2-Thr Copays)
[redacted]	
Exhibit 2	$2,620.00
Rocky Mountain UFEW	(Victim #2-therapy)
[redacted]	$2,945.00
	(Victim #1-therapy)
	$5,565.00

Exhibit 3	$ 70.00
Southwest Counseling	(Victim #3-therapy)
Associates	$120.00
[redacted]	(Victim #1-therapy)
	$190.00

5. The People further request this Court to order defendant to pay restitution for actual costs of future mental health treatment of the following victim(s):

Victim #2, Victim #1 and Victim #3

WHEREFORE, the People respectfully request the Court to enter Restitution Findings and Order of Judgment as a provision of defendant's sentence, and that the Mittimus be amended to reflect the Court's Order.

CAROL CHAMBERS
District Attorney
Eighteenth Judicial District

Date 7/5/06

By /s/ [Illegible]
Deputy District Attorney,
Reg. # 30039
7305 S. Potomac St., Suite 300
Centennial, CO 80112
(720) 874-8500

District Court, Arapahoe County, State of Colorado
Case# :D0032004CR000652 Div/Room: 402
JUDGMENT OF CONVICTION, SENTENCE Amended

The People of Colorado vs
GONSER, SHANNON KAY

DOB [redacted] SID 887493

The Defendant was sentenced on: 4/06/2006

People represented by . . . : SCHOBER,CHRISTINE

Defendant represented by: STUART, MARTIN

UPON DEFENDANT'S CONVICTION this date of: 1/13/2006

The defendant was found guilty after trial of:

Count # 15 Charge: Sex Assault/Child/Position Trust-Pattern
C.R.S # 18-3-405.3(1), (2)(b) Class: F3
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 30 Charge: INCEST/AGGRAVATED-DEFENDANT'S CHILD
C.R.S # 18-6-302(1)(a) Class: F3
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 31 Charge: Child Abuse-knowing/ reckless-bodily inj
C.R.S # 18-6-401(1)(a), (7)(a)(V) Class: M1
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 32 Charge: CHILD ABUSE-KNOWING/ RECKLESS-BODILY INJ
C.R. S # 18-6-401(1)(a), (7)(a)(V) Class: M1

Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006
Count # 33 Charge: CHILD ABUSE-KNOWING/ RECKLESS-BODILY INJ
C.R.S # 18-6-401(1)(a), (7)(a)(V) Class: M1
Date of offense(s): 1/12/1998 to 8/28/2003
Date of finding(s): 1/13/2006

IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to THE CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS

Department of Corrections 20.00 YRS-LF COUNT 15

CONCURRENT
WITH COUNT 30 CASE NUMBER:

PER ORDER OF 8-10-06 RESTITUTION IN THE AMOUNT OF $7845.00 ADDED /SMZ

Department of Corrections 20.00 YRS-LF COUNT 30

CONCURRENT
WITH COUNT 15 CASE NUMBER:

Jail 6.00 MONTHS COUNT 31

CONSECUTIVE CASE NUMBER: 652
TO COUNT 32 2004CR Arapahoe County

CONSECUTIVE CASE NUMBER: 652
TO COUNT 33 2004CR Arapahoe County

Jail 6.00 MONTHS COUNT 32

CONSECUTIVE CASE NUMBER: 652
TO COUNT 31 2004CR Arapahoe County

CONSECUTIVE CASE NUMBER: 652
TO COUNT 33 2004CR Arapahoe County

Jail 6.00 MONTHS COUNT 33

Credit for Time Served 85.00 DAYS COUNT 33

CONSECUTIVE CASE NUMBER: 652
TO COUNT 31 2004CR Arapahoe County

CONSECUTIVE CASE NUMBER: 652
TO COUNT 32 2004CR Arapahoe County

Plus a mandatory period of parole as required by statute.

Months on parole 0240

Court finds extraordinary aggravating circumstances.

Sex Offender Status: No SVP Findng Must Reg as SXOF

Assessed	Balance
$ 8,192.50	$ 8,067.78

THEREFORE, IT IS ORDERED the Sheriff of ARAPAHOE COUNTY shall convey the DEFENDANT to the following department TO BE RECEIVED AND KEPT ACCORDING TO LAW COLORADO STATE DEPARTMENT OF CORRECTIONS DIAGNOSTIC CENTER

ADDITIONAL REQUIREMENTS

The restraining order pursuant to C.R.S. 18-1-1001 shall remain in effect until final disposition of the action, or in the case of an appeal, until disposition of the appeal.

CT 15 & CT 30 MANDATORY PAROLE OF 20 YRS TO LIFE

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

DATE 8/10/06 NPT 4/06/06

JUDGE/
MAGISTRATE /s/ Mark Hanner for
MARILYN LEONARD ANTRIM

[Certificate Of Sheriff Omitted]

DISTRICT COURT ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
THE PEOPLE OF THE STATE OF COLORADO v. SHANNON GONSER nka Nelson Defendant.	↑ **COURT USE ONLY** ↑
	Case Number: 04CR652 Div.: 207

JUDGMENT OF ACQUITTAL

The Court hereby enters Judgment of Acquittal based upon **not guilty** verdict entered by the jury as to all counts. The bond is discharged.

Prepared in Chambers on July 29, 2010.

BY THE COURT:

/s/ Marilyn Leonard Antrim
Marilyn Leonard Antrim
District Court Judge

Certificate: Copies of the above order were mailed or sent via facsimile to counsel of record on July 29, 2010.

District Court, Arapahoe County, Colorado Arapaho County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff v. **SHANNON NELSON** (AKA SHANNON GONSER) Defendant	σ COURT USE ONLY σ
Martin Stuart, #28852 955 Bannock Street, suite 200 Denver, CO 80204 Phone (303) 355-6789 Fax (303) 623-0714 E-mail: martinstuartlaw@ solucian.com	Case No.: **04CR652** Division **207**

MOTION FOR RETURN OF PAYMENTS BY MS. NELSON PRIOR TO REVERSAL OF JUDGMENT AND ACQUITTAL

(Filed Mar. 23, 2011)

Ms. Nelson, through counsel, herein requests return of all restitution, fines, fees, and other costs to Ms. Nelson which she paid prior to the Mandate reversing the trial court's judgment of conviction and subsequent acquittal, and as grounds states:

PROCEDURAL HISTORY OF THIS CASE

I. Charges and Not Guilty Plea

1. In March. 2004, Ms. Nelson was charged with several criminal counts. Ultimately, after amendments by the prosecution, Ms. Nelson was charged with the following: two counts of Sexual Assault on a Child under 15 – Position of Trust (F3), fifteen counts of Sexual Assault on a Child – Position of Trust – Pattern (F3), seventeen counts of Aggravated Incest (F3), four counts of Child Abuse – Knowingly or Recklessly Causing Bodily Injury (M1), and two Violent Crime sentence enhancers.

2. On March 28, 2010, Ms. Nelson pled not guilty to all charges.

II. Trial, Jury Verdicts, and Sentence

3. On January 13, 2006, a jury found Ms. Nelson guilty of the following five counts: Sexual Assault on a Child – Position of Trust – Pattern (count 15), Aggravated Incest (count 30) and Child Abuse Knowingly or Recklessly Causing Bodily Injury (counts 31, 32, and 33). The jury acquitted. Ms. Nelson on all other counts.

4. On. April 6, 2006, based on the jury verdicts, this Court sentenced Ms. Nelson to the Department of Corrections for 20 years to Life concurrent on counts 15 and 30, and 6 months jail concurrent on counts 31, 32, and 33. Ms. Nelson was also ordered to pay the following:

a. Victim Compensation Fund: $125.00

b. Victims' Assistance: $162.50

c. Court Costs: $35.00

d. Time Payment Fee: $25.00

e. Restitution was reserved and ultimately ordered in the amount of $7,845.00.

5. Ms. Nelson was ordered to pay a total of $8,192.50.

6. While in the Department of Corrections, Ms. Nelson paid a total of $681.35, applied in the following manner:

a. Victim Compensation Fund: $125.00

b. Victims' Assistance: $162.50

c. Court Casts: $35.00

d. Time Payment Fee: $25.00

e. Restitution: $390.67.

III. Appeal and Reversal

7. Ms. Nelson appealed her convictions to the Court of Appeals.

8. On July 22, 2009, the Colorado Court of Appeals issued a Mandate reversing judgment and remanding the case to the district court for a new trial.

9. The judgment of conviction, and therefore, Ms. Nelson's sentence, was reversed.

IV. New Trial and Jury Verdicts

10. On. January 1, 2011, Ms. Nelson pled not guilty to the remaining charges.

11. On July 28, 2010, a jury returned not guilty verdicts on the remaining five charges.

12. On July 29, 2010, this Court signed an Order of Judgment of Acquittal based upon a not guilty verdict entered by the jury as to all counts and discharged Ms. Nelson's bond.

LAW

I. Constitutional Provisions Require the Return of Ms. Nelson's Payments

13. The Constitutions of the United States and Colorado require the return of Ms. Nelson's restitution payments.

14. No person shall be denied property without due process of law. US Const. Amend. V and XIV § 1; Colo. Const. Article II § 25.

15. No private property shall be taken for private use without consent of the owner or without just compensation. Colo. Const. Art. II §§ 14, 15. No private property shall be taken for public use without just compensation. US Const. Amend, V; Const. Art. II §§ 14, 15.

II. Restitution Statutes and Court Opinions Require Return of Ms. Nelson's Restitution Payments

16. Colorado Revised Statute Sections 18-1.3-205 and 18-1.3-602 require trial courts to order restitution payments for the benefit of the party immediately and directly aggrieved by a defendant who is convicted of a criminal act. *People v. Robb*, 215 P.3d 1253, 1254 (Colo. App. 2009); *People v. Borquez*, 814 P.2d 382, 384 (Colo. 1991).

17. "Payment of restitution is authorized only as to the victim of a defendant's conduct, and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct." *People v. Robb*, 215 P.3d 1253, 1254 (Colo. App. 2009) (quoting *People v. Deadmond*, 683 P.2d 763 (Colo. 1984)); *see People v. Borquez*, 81.4 P.2d 382, 384 (Colo. 1991).

III. Victims' Assistance Statute, Victims' Compensation Statute, and Court Costs Statutes Require Return of Ms. Nelson's Payments

18. C.R.S. § 24-4.2-1.04(1)(a)(I) permits a surcharge to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the victims and witnesses assistance and law enforcement fund.

19. C.R.S. § 24-4.1-119(1)(a) permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be

transmitted for credit to the crime victim compensation fund.

20. C.R.S. § 16-18-101(1) requires costs in criminal cases to be paid by the state when a defendant is acquitted.

21. C.R.S. § 13-32-105 permits docket fees to be assessed in criminal actions in the amount of $30 and an additional $5 surcharge, payable only when there is a conviction of the defendant.

ANALYSIS

22. On July 22, 2009, the Court of Appeals reversed the judgment of the trial court. Therefore, all previous sentencing orders were reversed, including orders to pay restitution and other fines, fees, and costs.

23. Ms. Nelson cannot be ordered to pay restitution because she was not convicted of any crime. *Sec* C.R.S. § 18-1.3-205; C.R.S. §18-1.3-602; *People v. Robb*, 215 P.3d 1253, 1254 (Colo. App. 2009); *People v. Borquez*, 814 P.2d 382, 384 (Colo. 1991).

24. Ms. Nelson cannot be required to pay court costs, victims' compensation fund fees, victims' assistance surcharges, or time payment fees because she was not convicted of any crime. *See* C.R.S, § 16-18-101(1);§ 13-32-105; C.R.S. § 24-4.2-104(1)(a)(I); C.R.S. § 24-4.1-119(1)(a).

25. Because Ms. Nelson had already paid previously ordered amounts, those amounts must now be returned to her.

26. Failing to return the money Ms. Nelson paid toward restitution and other fines, fees, and costs under these circumstances would be contrary to C.R.S. § 18-1.3-205, C.R.S. § 181.3-601, C.R.S. § 18-1.3-602, C.R.S. § 16-18-101(1), C.R.S. § 13-32-105, C.R.S. § 24-4.2-104(a)(a)(I), C.R.S. § 24-4.1-119(1)(a) and the interpretations of these statutes by the Colorado Supreme Court and Colorado Courts of Appeals.

27. Failing to return the money Ms. Nelson paid toward restitution and other fines, fees, and costs under these circumstances would violate Ms. Nelson's right to due process of law. U.S. Const. Amends. V and XIV; Colo. Const. Article II § 25.

28. Failing to return the money Ms. Nelson paid toward restitution and other fines, fees, and costs under these circumstances would also constitute an illegal taking of private property for private or public use in violation of Amendment V to the United States Constitution and Article II Sections 14 and 15 of the Colorado Constitution.

29. Therefore, all payments taken. from Ms. Nelson that were applied to restitution and all other fines, fees, and costs must be returned to Ms. Nelson.

CONCLUSION

30. Ms. Nelson was originally found guilty of five counts by a jury and acquitted of the remaining charges. While serving her sentence in the Department of Corrections, Ms. Nelson paid $681.35 of the amounts she was ordered to pay.

31. On appeal, Ms. Nelson's convictions and sentences were reversed. On retrial, Ms. Nelson was acquitted of all remaining counts.

32. On July 29, 2010, this Court signed an Order of Judgment of Acquittal based upon a not guilty verdict entered by the jury as to all counts.

33. Therefore, the $681.35 Ms. Nelson paid as a result of a conviction later overturned and no longer valid must be repaid to her.

34. Not returning these amounts to Ms. Nelson would be contrary to Colorado Revised Statutes and holdings of Colorado Supreme Court and Colorado Court of Appeals cases interpreting these statutes.

35. Not returning these amounts to Ms. Nelson would violate Ms. Nelson's right to due process and right not to have her private property taken for private or public use without permission or just compensation as set forth in Amendments V and XIV of the United States Constitution and Article II Sections 14, 15, and 25 of the Colorado Constitution.

36. Therefore, the total sum of $681.35 must be returned to Ms. Nelson immediately.

WHEREFORE, Ms. Nelson requests that this Court order the restitution, fines, fees, and costs she paid in the amount of $681.35 be returned to her immediately.

/s/ [Illegible]
Martin Stuart, #28852

[Certificate Of Service Omitted]

Louis Alonzo Madden

La Plata County

CASE NO. 2000CR76

RELEVANT DOCKET ENTRIES

2000-02-29	Affi in Suppt-Warrantless Arr
2000-03-03	Complaint filed In open court. Copy given to Defendant.
2000-05-30	Bindover to dist ct after prel Probable cause found on Counts 2 and 3. No probable cause found as to Count 1
2000-05-30	Preliminary Hearing/Preliminary Hearing Held
2000-07-28	Arraignment/Hearing Held
2000-07-28	Minute Order Westberg/people; Ipson/defendant. Defendant waives advisement. Not guilty pleas entered. Case set for jury trial on November 20, 2000 at 9:00 a.m. To last three days, with pretrial conference on November 9, 2000 at 8:30 a.m. Instructions to be filed at pretrial. Motions by prosecution or defense, to filed within 45 days. Both sides to supply each other with witness lists, including known rebuttal witnesses, no later than 30 days prior to trial.
2001-06-12	Minute Order Peoples motion to continue and motion to amend are granted. Jury trial

	on 6/18/01 is vacated. Reset for jury trial to last 4 days commencing at 9:00 a.m. on July 23, 2001, with pre-trial conference on July 13, 2001, at 8:30 a.m. Instructions to be filed at pretrial.
2001-07-23	Jury Trial/Hearing Held
2001-07-24	Jury Trial/Hearing Held
2001-07-25	Jury Trial/Hearing Held
2001-07-26	Jury Trial/Hearing Held
2001-07-26	Jury returns verdicts of guilty to Attempted Patronizing of a Prostituted Child in violation of CRS 18-2-101 and 18-7-406(1)(a) as am (f4) and Attempted Sexual Assault in 3d Degree in violation of CRS 18-2-101 and 18-3-405.3(1)(2) as am (f5). Court enters judgment and conviction pursuant to the jury verdicts. Defts bond is discharged and he is remanded to custody of La Plata County Jail pending sentencing. Sentencing set for September 28, 2001, at 8:30 a.m. Probation to contact defendant at jail for presentence investigation, to include a sex offender evaluation.
2001-09-25	Report/Restitution Report
2001-10-19	Sentencing Hearing/Hearing Held
2001-10-19	Minute Order Westberg/people; Ipson/defendant/ custody. Defendant sentenced to the Dept of Corrections for six years

	minimum with the possible maximum of the remainder of the defendants natural life. Defendant to receive credit for time served since July 26, 2000. Restitution in the amount of $910 and costs to be endorsed on mittimus.
2001-10-22	Order/Assessing Costs Fines And Restitution

LOUIS MADDEN

Colorado Court of Appeals

CASE NO. 02CA0024

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
01/04/2002	Notice of Filing of Appeal
08/08/2002	Opening Brief
11/21/2003	Answer Brief
01/06/2003	Reply Brief
04/14/2003	Opinion

LOUIS MADDEN

Colorado Supreme Court

CASE NO. 03SC771

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
11/17/2003	People's Petition for Writ of Certiorari
11/25/2003	Defendant's Cross-Petition for Writ of Certiorari
04/05/2004	Order of Court Granting Petition and Cross-Petition for Writ of Certiorari
05/14/2004	People's Opening Brief
06/14/2004	Defendant's Combined Opening-Answer Brief
07/19/2004	People's Combined Answer-Reply Brief
08/06/2004	Defendant's Reply
04/18/2005	Opinion and Order Reversing Judgment
05/02/2005	Defendant's Petition for Rehearing
05/16/2005	Order of Court Denying Petition for Rehearing
05/19/2005	Mandate

LOUIS MADDEN

Colorado Court of Appeals

CASE NO. 02CA0024

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
07/21/2005	Opinion on Remand
09/19/2005	Mandate

Louis Alonzo Madden

La Plata County

CASE NO. 2000CR76

RELEVANT DOCKET ENTRIES

2005-10-11	Order/Resentencing
2007-10-18	Petition for post-conviction relief pursuant to Crim P 35(c)
2007-11-26	The court finds the Petition and Reply for post-conviction relief substantially conforms to Form 4 of the Colorado Rules of Criminal Procedure. The court finds the claims raised in Paragraph 1 do not state adequate legal grounds for relief under Rule 35(c). The court finds, however that claims raised in Paragraph 2 concerning ineffective assistance of counsel if true may be grounds for relief pursuant to 35(c). The Petition, Response, Reply and Application For Court Appointed Counsel are forwarded to Public Defender pursuant to Crim P 35(3)(v). Public Defender to inform the court within 45 days if defendant eligible for court appointed counsel and whether the Motion has arguable merit.
2009-03-27	Rule 35C Hearing/Hearing Held
2009-04-10	Order Regarding Defendants Claim of Ineffective Assistance of Counsel
2009-05-11	Notice filed of intent not to appeal or retry case

2009-05-27	Request filed for (1) Order that Mr. Madden is no longer required to register (2) Refunding of costs and fees assessed in this case
2009-06-23	Order/Mr. Madden no longer has to register as a sex offender in this case. Hearing set on motion to refund costs and fees.
2009-08-13	Hearing Note: Fees/Costs/Hearing Held
2009-08-14	Minute Order Due to the conviction being vacated and the case dismissed, the court orders the defendant be reimbursed $1,220.00 of the $1,977.75 paid in costs. fees and restitution. The court is denying the request to reimburse restitution of $757.75.

LOUIS MADDEN

Colorado Court of Appeals

CASE NO. 09CA2081
(Second Appeal)

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
09/28/2009	Notice of Filing of Appeal
06/29/2011	Opening Brief
07/13/2012	Answer Brief
07/26/2012	Reply Brief
04/25/2013	Opinion

LOUIS MADDEN

Colorado Supreme Court

CASE NO. 13SC496
(Second Appeal)

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
08/05/2013	Petition for Writ of Certiorari
12/23/2013	Order of Court Granting Petition for Writ of Certiorari
08/08/2014	Opening Brief
12/03/2014	Answer Brief
04/13/2015	Reply Brief
12/21/2015	Opinion
01/29/2016	Petition for Rehearing
08/08/2016	Order of Court Denying Rehearing
02/10/2016	Mandate

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address:1060 E. 2nd Ave, Durango, Colorado 81301 Phone Number:247-2304 ccccccccccccccccccc **Plaintiff(s):** **The People of Colorado** **Defendant(s):** **LOUIS MADDEN** ccccccccccccccccccc Attorney or Party Without Attorney: SARAH LAW/CRAIG WESTBERG Phone Number: 247-8850 Fax Number: 970-259-0200 E-mail: Atty. Reg. #: 04511	□ COURT USE ONLY □ ccccccccccc Div.: Ctrm.:

RESTITUTION **DEFENDANT: MADDEN, LOUIS**
CASE NUMBER: 00CR 76

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TOTAL DUE $910.00

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PAY TO:

Victim Compensation Board
PO Box 3455
Durango, CO. 81302

Therapy expenses paid **$910.00**

Victim's Name

Marty Goldfarb
Assistant Victim Witness Coordinator
September 25, 2001

cc: District Court, Probation

VICTIM COMPENSATION BOARD
SIXTH JUDICIAL DISTRICT
PO BOX 3455
DURANGO, CO 81301

September 25, 2001

TO: Marty Goldfarb

FROM: Carol Little

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This is a request for restitution to be ordered on behalf of Victim Compensation for the following defendant:

Lou Madden Case # 01CR136

The following expenses have been paid by Victim Compensation on behalf of the following victim:

Victim's Name	
Therapy expenses	$ 910.00
Total	$ 910.00

District Court, La Plata County, State of Colorado
Case#:D0342000CR000076 Div/Room: 1
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC
JUDGMENT OF CONVICTION, SENTENCE Original
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The People of Colorado vs MADDEN, LOUIS ALONZO
DOB [redacted] SID XJ081536

(Filed Oct. 22, 2001)
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

The Defendant was sentenced on: 10/19/2001
People represented by . . . : WESTBERG, CRAIG
Defendant represented by: IPSON, KYLE
UPON DEFENDANT'S CONVICTION this date of: 7/26/2001
The defendant was found guilty after trial of:
Count # 2 Charge: PATRONIZING A PROSTITUTED CHILD-ATT
C.R.S # 18-7-406(1)(a) Class: F4
Date of offense(s): 1/20/2000 to 1/20/2000 Date of finding(s): 7/26/2001
Count # 3 Charge: SEX ASSAULT 3-EXPOSE TO CHILD-ATT
C.R.S # 18-3-404(1.5) Class: F5
Date of offense(s): 1/20/2000 to 1/20/2000 Date of finding(s): 7/26/2001
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IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to THE CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS
DEPARTMENT OF CORRECTIONS 6.00 YRS-LF
COUNT 2

CONCURRENT WITH COUNT 3 CASE NUMBER: 2000CR 76 La Plata County
CREDIT FOR TIME SERVED SINCE 07-26-01 /DFS
DEPARTMENT OF CORRECTIONS 6.00 YRS-LF
COUNT 3
CONCURRENT WITH COUNT 2 CASE NUMBER: 2000CR 76 La Plata County
Plus a mandatory period of parole as required by statute.
Months on parole 0000
The Court has NO recommendation as to the Regimented Inmate Training Program

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Assessed	Balance
$ 4,413.00	$ 4,413.00

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THEREFORE, IT IS ORDERED the Sheriff of La Plata County shall convey the DEFENDANT to the following department TO BE RECEIVED AND KEPT ACCORDING TO LAW COLORADO STATE DEPARTMENT OF CORRECTIONS DIAGNOSTIC CENTER

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ADDITIONAL REQUIREMENTS

CREDIT FOR TIME SERVED SINCE 07-26-01

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JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

DATE 10/22/01 NPT 10-19-01
JUDGE/MAGISTRATE /s/ Gregory G. Lyman
GREGORY G LYMAN

[Certificate Of Sheriff Omitted]

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. 2nd Ave., PO Box 3340, Durango, CO 81301 Phone Number: (970) 247-2304 CCCCCCCCCCCCCCCCCC **Plaintiff(s):** THE PEOPLE OF THE STATE OF COLORADO v. **Defendant(s):** **Louis Alonzo Madden** CCCCCCCCCCCCCCCCCC Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #.:	**COURT USE ONLY** CCCCCCCCCCC Case Number: 00CR76 Division: 1 Courtroom:

ORDER ASSESSING COSTS FINES AND RESTITUTION

(Filed Oct. 22, 2001)

The following court costs, fines, and restitution are hereby assessed and ordered to be paid by 5:00 p.m., the day of sentencing, to the Clerk of the Court:

Victim Compensation Fund:	$ 125.00
Victim Assistance Fund:	$ 125.00
Restitution:	$ 910.00

Probation Supervision Fee:	$
DSAS:	$ 45.00
DTST:	$ 25.00
Court Costs:	$ 30.00
Time Payment Fee:	$ 25.00
Drug Offender Surcharge:	$
Special Advocate Surcharge:	$ 1000.00
Sex Offender Surcharge:	$ 2000.00
Sex Offender Identification Fee:	$ 128.00
TOTAL DUE UPON SENTENCING:	**$ 4413,00**

IF YOU ARE UNABLE TO PAY THE FINES, COURT COSTS, AND RESTITUTION DUE AT THE TIME OF SENTENCING, YOU SHALL CONTACT THE COLLECTIONS INVESTIGATOR IMMEDIATELY AT (970) 247-2526. IF A PAYMENT SCHEDULE IS AUTHORIZED BY THE COLLECTIONS INVESTIGATOR, YOU SHALL MAKE ALL PAYMENTS AS ORDERED BY THE COLLECTIONS INVESTIGATOR. FAILURE TO DO SO WILL RESULT IN A BENCH WARRANT BEING ISSUED FOR YOUR ARREST. YOU MAY BE JAILED UNTIL YOU HAVE PAID IN FULL.

You shall keep the Court and the Collections Investigator advised of your correct address and telephone number at all times while this order is in effect. You must appear in Court in the future as directed by the Court. Notices will be sent in the mail.

DONE AND SIGNED BY THE COURT this 22nd day of ~~September~~ October, 2001.

/s/ Gregory G. Lyman
DISTRICT COURT JUDGE

Xc: Collections Investigator [✓]
D.A. [✓]
Probation Department
Defense Attorney – [IPSON]
Department of Corrections [✓]

LA PLATA COMBINED
COURTS, COLORADO

Court Address:
1060 E 2nd Ave
Room 106
Durango, CO 81301-5157

Phone Number: 970-247-2004

CCCCCCCCCCCCCCCCCCC

The People of Colorado
vs
MADDEN, LOUIS ALONZO

^ COURT USE ONLY ^
CCCCCCCCCCCC
Case Number:
2000CR000076

Division: 1

SENTENCE ORDER

Defendant: MADDEN, LOUIS ALONZO

Count	**Plea**	**Finding**
1 18-3-405.3(1)(2) – SEX ASSLT CHILD UND 15-POS TRUST-ATT		Dism by Court
2 18-7-406(1)(a) – PATRONIZING A PROSTITUTED CHILD-ATT	Plea Not Guilty	Dism by Court
3 18-3-404(1.5) – SEX ASSAULT 3-EXPOSE TO CHILD-ATT	Plea Not Guilty	Guilty

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ASSESED FINES & COSTS
Count # 2

Department of Corrections	
Victim Compensation Fund	$125.00
Victims Assistance Fund	$125.00
Court Costs – prior to 6/6/03	$30.00

Drug Standardized Assessment	$45.00
Drug Testing – Cost Recovery	$25.00
Request for Time to Pay	$25.00
Special Advocate Surcharge	$1,000.00
Sex Offender Surcharge	$2,000.00
Sex Offender I.D. Fund	$128,00
Restitution	$910.00
Count # 3	
Department of Corrections	
Department of Corrections: 3 YEARS	
TOTAL	**$4,413.00**

Concurrent with count 3 of case number 00CR76 in La Plata Combined Courts
Concurrent with count 2 of case number 00CR76 in La Plata Combined Courts
Concurrent with count 3 of case number 00CR76 in La Plata Combined Courts
Concurrent with count 2 of case number 00CR76 in La Plata Combined Courts
Concurrent with count 3 of case number 00CR76 in La Plata Combined Courts
Concurrent with count 3 of case number 00CR76 In La Plata Combined Courts

Other Conditions of Sentence:

JRW/BW 090905
DEFENDANTS JUDGMENT OF CONVICTION AS TO COUNT II IS DISMISSED. THE JUDGMENT OF CONVICTION OF ATTEMPED [sic] THIRD DEGREE SEXUAL ASSUALT [sic] IS REVERSED AND THE COURT RESENTENCES THE DEFENDANT TO 3 YEARS AT THE DEPARTMENT

OF CORRECTIONS WITH CREDIT FOR TIME SERVED SINCE 10-19-01 AND NO PAROLE. /BW

CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

LYMAN, GREGORY G	09/09/2005
Judge/Magistrate	**Date**
MADDEN, LOUIS ALONZO	09/09/2005
Defendant	**Date**

**********NOTICE**********

Following this hearing you are to present this form to the Clerk's Office for payment. Payment is due by the end of business on your Court Date. Failure to pay when due will result in additional costs pursuant to HB1198.

La Plata Combined Courts, State of Colorado
Case#:D0342000CR000076 Div/Room: 1
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC
JUDGMENT OF CONVICTION, SENTENCE Amended
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC
The People of Colorado vs MADDEN, LOUIS ALONZO
DOB [redacted] SID 1068665
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC
The Defendant was sentenced on: 9/09/2005 Sentenced Modified on:10/11/2005
People represented by . . . : WESTBERG, CRAIG
Defendant represented by: IPSON, KYLE
UPON DEFENDANT'S CONVICTION this date of: 7/26/2001
The defendant was found guilty after trial of:
Count # 3 Charge: SEX ASSAULT 3-EXPOSE TO CHILD-ATT
C.R.S # 18-3-404(1.5) Class: F5
Date of offense(s): 1/20/2000 to 1/20/2000 Date of finding(s): 7/26/2001
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC
IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to THE CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS
Department of Corrections 6.00 YRS-LF SET ASIDE
COUNT 2
CONCURRENT WITH COUNT 3 CASE NUMBER: 2000CR 76 d Courts
Department of Corrections 6.00 YRS-LF REVOKED
COUNT 3
Department of Corrections 3.00 YEARS
COUNT 3

CONCURRENT WITH COUNT 2 CASE NUMBER: 2000CR 76 d Courts
JRW/BW 090905
DEFENDANT'S JUDGMENT OF CONVICTION AS TO COUNT II IS DISMISSED. THE JUDGMENT OF CONVICTION OF ATTEMPED [sic] THIRD DEGREE SEXUAL ASSUALT [sic] IS REVERSED AND THE COURT RESENTENCES THE DEFENDANT TO 3 YEARS AT THE DEPARTMENT OF CORRECTIONS WITH CREDIT FOR TIME SERVED SINCE 10-19-01 AND NO PAROLE. /BW
The Court has NO recommendation as to the Regimented Inmate Training Program

CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

Assessed	Balance
$ 4,413.00	$ 2,498.33

CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

THEREFORE, IT IS ORDERED the Sheriff of La Plata County shall convey the DEFENDANT to the following department TO BE RECEIVED AND KEPT ACCORDING TO LAW COLORADO STATE DEPARTMENT OF CORRECTIONS DIAGNOSTIC CENTER

CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

ADDITIONAL REQUIREMENTS

CREDIT FOR TIME SERVED SINCE 10-19-01

CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

DATE 10/11/05 NPT 9/9/05
JUDGE/MAGISTRATE /s/ Jeffrey Raymond Wilson
Jeffrey Raymond Wilson

[Certificate Of Sheriff Omitted]

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. 2nd Ave., Durango, CO 81301 Phone Number: (970) 247-2304 **Plaintiff(s): People of the State of Colorado** **Defendant(s): Louis A. Madden** CCCCCCCCCCCCCCCCCC	**COURT USE ONLY** CCCCCCCCCCCC **Case Number:** 00CR76 Division: 4

ORDER REGARDING DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

(Filed Apr. 10, 2009)

This case came before the Court upon the defendant's C. R. Crim. P. 35(c) motion alleging his trial counsel provided ineffective assistance of counsel. After hearing the evidence and reviewing the transcript of the proceedings, the Court makes the following findings by a preponderance of the evidence:

The defendant was found guilty at trial regarding two felony counts, one of which was reversed on appeal, resulting from allegations of inappropriate sexual contact with a minor, S. J. S. J. at the time of the assault was a 14-year-old Navajo girl for whom English was a second language and who had an I.Q. in the low to mid 70's. She was residing in a group home to receive drug treatment, and evidence indicated that she had some

sort of court proceedings the week the assault occurred. The evidence supporting the conviction consisted of the complaints of S. J., who testified that the defendant while driving a trolley made suggestive comments to her when she entered the trolley. When S. J. was the only passenger on the trolley, the driver parked near a normal trolley stop, pushed S.J. against a window of the trolley, ordered S. J. to remove her pants, and when she wouldn't, masturbated on her stomach.

S. J. did not immediately report the assault, but her group home mother noticed that S. J. seemed angry when she came home and stayed in her room for the evening. Both the group home mother and S. J. independently recorded the date of the assault as being on January 20, 2000, S. J. testified both that she recorded the date on the day after the incident and that she recorded it a few weeks later. The group home mother testified that she did not immediately record the night that S. J. came home angry and was not sure when exactly she noted it on S. J.'s log. S. J. reported the assault to the group home mother approximately two weeks after the assault and the group home mother took S. J. to the Durango Police Department the next day.

Based upon S. J.'s report, Detective Lammon prepared a photo lineup that contained the pictures of two trolley drivers along with four other individuals that roughly matched S.J.'s description of the assailant. Records of Durango Transit indicated that both of the trolley drivers in the lineup had worked on January 20th. S. J. was unable to pick her assailant out of the

lineup, Detective Lammon then prepared a different photo lineup containing six individuals. In this second photo lineup, S. J. picked out the defendant as her assailant. The records of Durango Transit clearly indicate that the defendant had not worked on January 20, 2000, but had driven the trolley on January 21, 2000.

Due to discrepancy in the dates and the absence of scientific evidence, the strength of S. J.'s identification of the defendant as being her assailant was crucial to both the prosecution and the defense. At the C. R. Crim. P. 35(c) hearing, the current attorney made various arguments that the defendant's trial counsel was ineffective. The most critical of these arguments were that:

1. Defense counsel introduced testimony that the defendant may have destroyed evidence that was inculpatory toward him;

2. Defense counsel introduced evidence of the defendant previously making inappropriate sexual remarks to a woman while he was working as a bus driver;

3. Defense counsel failed to object when the prosecutor asked the defendant on cross-examination questions that indicated the prosecutor had knowledge of other inappropriate sexual conduct by the defendant, and by failing to object when the prosecutor made references to the defendant's "sexual problems" during closing argument[1];

---

[1] Although the defendant's trial counsel did not make a very clear record, it appears to the Court that he did object to these

4. Defense counsel failed to object to a police officer testifying that S. J. was "honest" when being interviewed, as well as other inappropriate comments on S.J.'s credibility;

5. Defense counsel failed to object and obtain a curative instruction from the court when Detective Lammon testified on the direct examination of the prosecutor that the defendant discussed taking a polygraph and allowing more references into evidence and argument about polygraphs and lie detectors, some of which were initiated by defense counsel.

In a proceeding under C. R. Crim. P. 35(c), the burden of proof is upon the defendant to show by a preponderance of the evidence that the conviction was invalid. *People v. Naranjo,* 840 P.2d 319 (Colo. 1992), The defendant must show that defense counsel's trial performance was deficient and fell outside the normal range of competence for defense attorneys. In addition, the defendant must show that but for trial counsel's deficient performance at trial, there is a reasonable probability the jury would have reached a different verdict. *Strickland v. Washington,* 466 U.S. 668 (1984); *People v. Garcia,* 815 P.2d 937 (Colo. 1991).

The defendant has clearly shown that trial counsel's performance was deficient. On cross-examination defense counsel prompted a witness to testify to a rumor that the defendant was seen burning a red shirt

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references at bench conferences that are not on the record. See p. 548 of the transcript. The Court will not consider this claim on the motion for ineffective assistance of counsel.

with the brand Budweiser imprinted upon it that S.J. testified her assailant had been wearing. Tr. pp. 412-413. This allowed the prosecutor to cross-examine her about the rumor, Tr. p. 418, and bring it to the jury's attention once again, even though the rumor was inadmissible double or triple hearsay. In addition, trial counsel injected questions and later testimony from the defendant that he had previously been accused of and subjected to discipline by his former employer for making inappropriate sexual remarks when driving a bus for said previous employer. Tr. pp. 529, 589, 603, and 619-620. Trial counsel testified at the 35(c) hearing that he had strategic reasons for introducing such evidence. However, the evidence was extremely damning and defense counsel could have easily attempted to achieve his strategic goals through defense normal cross-examination.

Officer Warfield's comment that S.J. was truthful, Tr. p. 344, was clearly objectionable and trial counsel should have asked the court to immediately instruct the jury that they were to ignore the remark and that the jury was the sole judge of the credibility of all the witnesses. Trial counsel should have objected at the first mention of a polygraph or lie detector and requested the court give a cautionary instruction to the jury. The repeated reference by the prosecutor without objection and the prosecutor's introducing evidence that the defendant refused to take a polygraph left the inference that the defendant was lying when he denied that he committed the crime. Instead of objecting and asking for a cautionary instruction, the defense

counsel increased the prejudice to his client by asking both Detective Lammon and the defendant questions about the offer to take a polygraph, trying to explain the defendant's decision not to take one. Tr. pp. 492, 547(twice), 548, 555, 558, 602, 604-605, 626, 628, and 656-657.

The Court has been unable to find any reported case where polygraphs were mentioned as much as in this trial. The admission of polygraph evidence was discussed in *People v. Kerber,* 64 P.3d 930 (Colo.App. 2002):

> Lie detector or polygraph evidence is per se inadmissible in a criminal trial. *People v. Dunlap,* 975 P.2d 723 (Colo. 1999). However, the mere reference to such testing does not require a mistrial. *United States v. Blaze,* 143 F.3d 585 (10th Cir.1998); *People v. Preciado-Flores,* 66 P.3d 155 (Colo.App. 2002) (trial court did not abuse its discretion in denying mistrial where jury was inadvertently informed defendant had taken a lie detector test, but was not told result of the test).
>
> A Michigan court has identified several factors that should be considered in determining whether reversal is required: (1) whether the defendant objected or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than only the fact that a test was

> conducted. See *People v. Nash*, 244 Mich.App. 93, 625 N.W.2d 87 (2000).

Kerber, p. 933. The constant references by both parties to the defendant's initial offer to take a polygraph coupled with evidence he did not take one when combined with the references to S. J.'s being truthful and the prosecutor's assertion in closing argument that the defendant was "lying" was clearly outside the range of professional competence of defense attorneys in Southwest Colorado when this case was tried.

While there was significant evidence that could have caused the defendant to be convicted had the defendant's trial counsel not committed the errors discussed above, the Court is convinced that there is a reasonable probability that but for the deficient performance of the defendant's attorney, the defendant would not have been convicted at trial. The Court therefore grants the defendant's C. R. Crim. P. 35(c) motion and vacates the defendant's conviction. The district attorney shall inform the Court within 30 days if it intends to try the defendant a second time.

Done and signed this 10th day April, 2009.

/s/ Jeffrey R. Wilson
Jeffrey R. Wilson
District Court Judge

[✓]XC: DA
PD

DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 E. Second Avenue, Durango, CO 81301 (970) 247-2304 CCCCCCCCCCCCCCCCCC	
Plaintiff: People of the State of Colorado **Defendant:** **LOUIS ALONZO MADDEN** CCCCCCCCCCCCCCCCCC	□COURT USE ONLY□ CCCCCCCCCCCC **Case Number:** **00 CR 76**
Todd Risberg, District Attorney, Reg. 24763 P.O. Drawer 3455, Durango, CO 81302 (970) 247-8850 Fax: (970) 259-0200	Div.: 4 Ctrm.

NOTICE OF INTENT NOT TO APPEAL OR RETRY CASE

(Filed May 11, 2009)

COMES NOW, TODD RISBERG, DISTRICT ATTORNEY, WITHIN AND FOR THE SIXTH JUDICIAL DISTRICT OF THE STATE OF COLORADO, in the name and by the authority of the People of the State of Colorado, and states as follows:

1. The People do not intend to appeal the Court's decision on the 35(c) Motion or retry the case.

Respectfully submitted this 11 day of May, 2009.

TODD RISBERG
DISTRICT ATTORNEY

/s/ Todd Risberg
Todd Risberg, Reg. 24763
District Attorney

DISTRICT COURT LA PLATA COUNTY, COLORADO 1060 EAST 2nd AVE Durango, COLORADO 81301 CCCCCCCCCCCCCCCCCC THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. LOUIS MADDEN, Defendant CCCCCCCCCCCCCCCCCC DOUGLAS WILSON, Colorado State Public Defender THOMAS R. WILLIAMSON No. 15329 Deputy State Public Defender 101 West 11th Street, Suite 108 Durango, CO 81301 Phone: (970) 247-9284 Fax: (970) 259-6497 E-Mail: durango.defenders@state.co.us	□COURT USE ONLY□ CCCCCCCCCCCC **DIVISION 4** **Case Number: 00CR76**
REQUEST FOR (1) ORDER THAT MR. MADDEN IS NO LONGER REQUIRED TO REGISTER (2) REFUNDING OF COSTS AND FEES ASSESSED IN THIS CASE	

(Filed May 27, 2009)

Defendant requests this Court to issue orders (1) that indicates he no longer has to register as a sex

offender and (2) that fees and costs he paid pursuant to his conviction in the case be returned to him.

AS GROUNDS the following is stated:

1. On April 10, 2009, this Court vacated the Defendant's conviction in this case and on May 11, 2009, the District Attorney indicated, by motion, that he would not intend to prosecute this case. As a result, the Defendant's remaining conviction has been vacated.

2. Defendant has contacted his local police authority and was instructed to obtain a court order that provides that he no longer is required to register as a sex offender. Defendant requests this Court to issue an order indicating he no longer has to register for this case.

3. While the time Mr. Madden served in the Department of Corrections cannot be made up for, the court should order the return of fees and costs that Mr. Madden has paid as part of is [sic] sentence in this case. Court records indicate that the Defendant has paid approximately $1977.75 of the assessed costs, fees and surcharges in the case ($757.75 of these costs included restitution):

Accounts Receivable	Assessed	Applied	J/S Recd Rel Cse	Balance
Court Costs	$30.00			$30.00
Drug Standardized Assessment	$45.00			$45.00

Drug Testing – Cost Recovery on T&C	$25.00		$25.00
Restitution	$910.00	$757.75	$152.25
Sex Offender Identification Fund	$128.00		$128.00
Special Advocate Surcharge	$1,000.00	$1,000.00	
Sex Offender Surcharge	$2,000.00		$2,000.00
Time Payment Fee	$25.00		$25.00
Victim's Assistance Fund	$125.00	$95.00	$30.00
Victim Compensation Fund	$125.00	$125.00	

Defendant requests this Court to issue orders (1) that indicates he no longer has to register as a sex

offender and (2) that fees and costs he paid pursuant to his conviction in the case be returned to him.

DOUGLAS WILSON
COLORADO STATE
PUBLIC DEFENDER

/s/ Thomas R. Williamson
Thomas R. Williamson, 15329
Deputy State Public Defender

[Certificate Of Service Omitted]

RECORD AND BRIEFS

No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence in a separate civil proceeding to get their money back.

The Question Presented is whether this requirement is consistent with due process.

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ARGUMENT 20

Colorado violates the Due Process Clause by requiring a defendant whose conviction is reversed to prove her innocence by clear and convincing evidence to get a refund of monetary payments entailed by the conviction. 20

A. Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. 21

B. Colorado's scheme is contrary to fundamental principles governing procedural due process. 22

C. Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld. 24

D. Colorado's scheme is contrary to traditional practice, under which the reversal of a judgment has always required the refund of money paid pursuant to that judgment. 26

E. Colorado's scheme is contrary to the practice of every other jurisdiction. 30

F. A state must refund all monetary payments pursuant to a conviction when that conviction is reversed, regardless of what those payments are called. 35

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BRIEF FOR PETITIONERS

Petitioners Shannon Nelson and Louis Alonzo Madden respectfully request that this Court reverse the judgments of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court in *People v. Nelson* is reported at 362 P.3d 1070 (Colo. 2016). Pet. App 1a. The opinion of the Colorado Supreme Court in *People v. Madden* is reported at 364 P.3d 866 (Colo. 2016). Pet. App. 36a. The opinion of the Colorado Court of Appeals in *People v. Nelson* has not been published but is available at 2013 WL 1760903 (Colo. Ct. App. 2013). Pet. App. 50a. The opinion of the Colorado Court of Appeals in *People v. Madden* has not been published but is available at 2013 WL 1760869 (Colo. Ct. App. 2013). Pet. App. 64a.

JURISDICTION

The judgments of the Colorado Supreme Court were entered on December 21, 2015. The Colorado Supreme Court denied timely petitions for rehearing on February 8, 2016. Pet. App. 77a, 78a. The petition for certiorari was filed on April 6, 2016. This Court granted certiorari on September 29, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law."

Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to -103, is reproduced in the Appendix to this brief.

STATEMENT

Like many states, Colorado requires people convicted of crimes to pay various monetary charges, including fines, court costs, fees, and restitution. But Colorado appears to be the only state that does not refund this money when a conviction is reversed. Colorado keeps the money. The only way a person can get his or her money back is to bring a separate civil action and prove, by clear and convincing evidence, that he or she is actually innocent of the charged offense.

Colorado's scheme is inconsistent with due process.

A. Legal Background

1. A party who has paid money pursuant to a judgment has always been entitled to a refund when the judgment is reversed. *See, e.g., Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919) ("[A] party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby."); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established.").

Until this case, Colorado followed the traditional rule. *See, e.g., Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing conviction, ordering that "the parties be placed in *status quo* by refund to the defendant of the sums paid as fine and costs"); *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1991) (quoting *Arkadelphia Milling*, 249 U.S. at 145); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo. Ct. App. 1993) ("a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution").

In this case, however, the Colorado Supreme Court abrogated the traditional rule, by construing Colorado's Exoneration Act as the exclusive remedy for obtaining a refund of monetary payments when a conviction is reversed.

The Exoneration Act is entitled "Compensation for Certain Exonerated Persons." Colo. Rev. Stat. §§ 13-65-101 to -103, App. 1a-18a. As its name suggests, the Exoneration Act was intended to provide compensation for certain convicted defendants who are later exonerated of their crimes. The immediate impetus for the Exoneration Act was the case of Robert Dewey, who was convicted of murder in a Colorado state court and who served eighteen years of a life sentence before being exonerated of the crime by DNA evidence. Colorado House Judiciary Committee, Hearing on HB 13-1230, Mar. 7, 2013, at 2:15-

4:35 (statements of Reps. Williams and Pabon) (hereafter cited as House Judiciary Hearing).[1]

The sponsors of the Exoneration Act believed that Colorado owed a moral responsibility to Mr. Dewey and to others who might follow in his footsteps. *Id.* at 0:55-2:13 (Rep. Williams), 4:36-5:16 (Rep. Pabon). The Act's sponsors argued that Colorado should join the federal government, 27 other states, and the District of Columbia by enacting legislation to compensate exonerated defendants like Mr. Dewey. *Id.* at 5:43-5:50 (Rep. Pabon).

The legislation was supported equally by prosecutors and defense lawyers. The Colorado Attorney General's office supported it, as did the Colorado Criminal Defense Bar and the American Civil Liberties Union. *Id.* at 15:33-16:10 (Rep. Pabon). No individual or entity spoke in opposition to the measure.

Throughout the legislative process, the Act's supporters emphasized how few defendants would be eligible for compensation. One of the bill's principal sponsors explained that the Act was not designed to compensate defendants who "get off on a technicality." It was designed only for those who are "actually innocent." *Id.* at 16:15-16:30 (Rep. Pabon). A representative of the Colorado Attorney General's office testified that the legislation was "narrowly defined" and that it would not apply to defendants who "are

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[1] Audio at http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=3214. For more information about Robert Dewey's case, see *The National Registry of Exonerations: Robert Dewey* (2015), http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3910.

just acquitted after trial" or those "who have their convictions reversed after appeal based on a procedural or a legal error." Colorado Senate Judiciary Committee, Hearing on HB 13-1230, April 24, 2013, at 1:47:58-1:48:20 (statement of Assistant Attorney General Julie Selsberg).[2]

The General Assembly likewise assumed that the Exoneration Act would apply only in very rare circumstances. The General Assembly projected that compensation under the Act would be awarded to only one defendant every five years. Colorado Legislative Council Staff Fiscal Note, *State and Local Revised Fiscal Impact, HB13-1230*, March 26, 2013, at 2.[3] The Attorney General of Colorado testified that recent experience suggested the Exoneration Act would provide compensation even less often than that. According to the Attorney General, among the 207 defendants whose convictions had been reversed between 2007 and 2012, "none of those people are likely to be in a position to prove actual innocence." House Judiciary Hearing at 51:12-51:30 (statement of Attorney General John Suthers).

The House Judiciary Committee passed the legislation unanimously. The measure passed the full House by a vote of 60-2. The full Senate passed the bill unanimously. The Governor signed the legislation into law on June 5, 2013.

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[2] Audio at http://coloradoga.granicus.com/MediaPlayer.php?view_id=47&clip_id=3854.

[3] http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_r1.pdf.

2. The Exoneration Act is entitled "Compensation for Certain Exonerated Persons." The Act provides for compensation only to "a person who has been convicted of a felony," only when that person has been "sentenced to a term of incarceration ... and has served all or part of such sentence," and only "upon a finding that the person was actually innocent of the crime for which he or she was convicted." *Id.* § 13-65-102(1)(a).

To recover under the Exoneration Act, a defendant must file a civil action and prove, by clear and convincing evidence, that he or she is "actually innocent" of the crime. *Id.* § 13-65-101(1)(a). The Act specifies that the "court may not reach a finding of actual innocence pursuant to this section merely ... [b]ecause the court finds the evidence legally insufficient to support the petitioner's conviction." *Id.* § 13-65-101(1)(b)(I). Nor may the court reach a finding of actual innocence merely "[b]ecause the court reversed or vacated the petitioner's conviction because of a legal error unrelated to the petitioner's actual innocence." *Id.* § 13-65-101(1)(b)(II). Nor may the court reach a finding of actual innocence merely "[o]n the basis of uncorroborated witness recantation alone." *Id.* § 13-65-101(1)(b)(III). Rather, a finding of actual innocence must be based on the petitioner's presentation of "reliable evidence that he or she was factually innocent of any participation in the crime at issue." *Id.* § 13-65-101(1)(a)(II).

Moreover, before a petition may be filed under the Exoneration Act, a defendant must make two additional showings. First, a court must have vacated or reversed all convictions in the case based on either

"reasons other than legal insufficiency of evidence" or "legal error unrelated to the petitioner's actual innocence." *Id.* §§ 13-65-102(2)(a)(I), (II). That is, if the ground for vacatur or reversal is insufficiency of evidence or some other error related to the defendant's actual innocence, the defendant is, paradoxically, *not* eligible to file a petition under the Exoneration Act. Second, there must be no prospect of further prosecution. There must be either "an order of dismissal of all charges," *id.* § 13-65-102(2)(a)(I), or "an acquittal of all charges after retrial," *id.* § 13-65-102(2)(a)(II).

When a petitioner can surmount these hurdles and can prove by clear and convincing evidence that he or she is actually innocent, the Act provides a monetary award of $70,000 for each year he or she was incarcerated, *id.* § 13-65-103(3)(a), an additional $50,000 for each year he or she was incarcerated under a death sentence, *id.* § 13-65-103(3)(a)(I), and $25,000 for each year he or she served on parole, on probation, or as a registered sex offender after a period of incarceration, *id.* § 13-65-103(3)(a)(II). The petitioner is also entitled to other benefits in certain circumstances, including tuition waivers at state colleges, *id.* § 13-65-103(2)(e)(II), and compensation for child support payments, *id.* § 13-65-103(2)(e)(III).

Finally—and most importantly for this case—where a petitioner can prove by clear and convincing evidence that he or she is actually innocent, the Exoneration Act entitles the petitioner to recover "[t]he amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated per-

son as a result of his or her wrongful conviction." *Id.* § 13-65-103(2)(e)(V).

There is no indication that the Colorado General Assembly, by including this last provision in the Exoneration Act, meant to abrogate the traditional rule requiring the refund of money paid pursuant to a judgment when that judgment is reversed. The purpose of the Exoneration Act was to create new rights for exonerated defendants, not to take traditional rights away from non-exonerated defendants. The legislature's goal was to bring Colorado law into alignment with the law of other states, not to set Colorado apart.

Nevertheless, as a result of this case, it is now virtually impossible for most defendants whose convictions are reversed to get refunds of fines, penalties, court costs, and restitution. That is because in this case the Colorado Supreme Court interpreted the statute to provide the exclusive remedy under state law for the refund of monetary payments upon the reversal of a conviction. Pet. App. 14a-20a. Before this case, all criminal defendants were entitled to refunds when their convictions were reversed. Now, however, the only defendants entitled to such refunds are those who can satisfy the stringent requirements of the Exoneration Act. To recover monetary payments after the reversal of a conviction, Colorado defendants must now prove their actual innocence by clear and convincing evidence—the same heavy burden imposed on a defendant seeking the $70,000 per year compensation for his or her period of wrongful incarceration.

This burden is impossible for the vast majority of defendants to satisfy, for several reasons. First, most convictions are reversed because of legal errors, not because the defendant has proven her innocence. The Exoneration Act explicitly provides that reversal on legal grounds is not sufficient to constitute a finding of actual innocence. *Id.* § 13-65-101(1)(b)(II). The Act also explicitly bars a finding of actual innocence merely because a conviction has been reversed for legally insufficient evidence, *id.* 13-65-101(1)(b)(I), so even defendants the state cannot prove guilty are left unable to recover monetary payments after reversal. Even defendants who are acquitted after a reversal cannot recover, because the Act requires defendants to prove their innocence by clear and convincing evidence. *Id.* § 13-65-101(1)(a). It is not enough for a defendant to show that she is not guilty beyond a reasonable doubt.

Second, the Exoneration Act is not available to many defendants. To recover under the Act, a defendant must have been "convicted of a felony," the defendant must have been "sentenced to a term of incarceration," and the defendant must have "served all or part of such sentence." *Id.* § 13-65-102(1)(a). This provision bars many defendants from recovering monetary payments upon the reversal of a conviction, including defendants convicted of misdemeanors, defendants convicted of felonies who did not receive a sentence of incarceration, and defendants who did receive a prison sentence but who were out on bail pending appeal. Monetary payments made pursuant to convictions in such cases, including "any fine, penalty, court costs, or restitution," *id.*

13-65-103(2)(e)(V), can never be recovered by the defendant, even when her conviction is reversed.

Third, even where a defendant can get past these obstacles, the Exoneration Act is a practical barrier to recovery for defendants who merely seek a refund, because the sums involved are typically too small to justify the expense of filing a separate civil action. The only plaintiffs who can realistically be expected to file suit under the Act are people seeking tort-like damages for wrongful incarceration, because such damages can be as large as $120,000 per year. No rational person would file suit under the Exoneration Act to recover a few hundred dollars of court costs, and no rational lawyer would take such a case. Although the Exoneration Act provides "[r]easonable attorney fees for bringing a claim under this section," *id.* § 13-65-103(2)(e)(IV), the Colorado courts have not had any opportunity to consider what would be a reasonable fee for bringing a suit to recover such a small amount, because it appears that no lawyer has ever been foolhardy enough to file one.

The Exoneration Act applies to virtually all monetary payments made "as a result of" a conviction. *Id.* § 13-65-103(2)(e)(V). The Act applies to "any fine," *id.*, so a defendant whose sentence included a fine cannot recover that fine when her conviction is reversed, unless she can prove her innocence by clear and convincing evidence. The Act applies to "any ... penalty," *id.*, so a defendant whose sentence included penalties other than fines (such as forfeitures and the wide array of surcharges Colorado imposes on convicted defendants) cannot recover those penalties when her conviction is reversed, unless she can

prove her innocence by clear and convincing evidence. The Act applies to "court costs," *id.*, so a defendant whose conviction entailed the payment of one of the many costs Colorado charges to convicted defendants cannot recover those costs when her conviction is reversed, unless she can prove her innocence by clear and convincing evidence. Finally, the Act applies to "restitution," *id.*, so a defendant whose sentence included the payment of restitution cannot recover that payment when her conviction is reversed, unless she can prove her innocence by clear and convincing evidence. No matter what a payment is called, Colorado keeps that payment despite the reversal of a conviction, except in the very rare case in which a defendant can prove by clear and convincing evidence that she is actually innocent.[4]

Indeed, in the three years since the Exoneration Act went into effect, we are unaware of any cases in which a defendant has sought the refund of monetary payments under the Exoneration Act upon the reversal of a conviction. The Colorado General Assembly and the Colorado Attorney General were correct when they predicted that the Act would afford a remedy to few, if any, defendants whose convictions are reversed.

By construing the Exoneration Act as the exclusive remedy for the refund of monetary payments

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[4] By contrast, the Exoneration Act expressly preserves the traditional right to a refund upon reversal where the *state* would be the beneficiary. When a judgment awarding compensation under the Exoneration Act is reversed on appeal, "the court may take such action as is necessary to recover the amount of any compensation awarded." *Id.* § 13-65-102(7)(d).

upon the reversal of a conviction, the Colorado Supreme Court has denied the overwhelming majority of criminal defendants in Colorado any opportunity to recover such payments when their convictions are reversed.

B. Facts and Opinions Below

1. This case consolidates two cases raising the same issue that were decided on the same day by the Colorado Supreme Court.

a. Petitioner Shannon Nelson was convicted in 2006 of sexual assault offenses she allegedly committed against her children. Pet. App. 1a. In addition to a prison term, Nelson's sentence included several monetary charges that state law imposes only on defendants who are convicted. These were: (1) a $125 "cost" designated for Colorado's Crime Victim Compensation Fund;[5] (2) a $162.50 "surcharge" designated for Colorado's Victims and Witnesses Assistance and Law Enforcement Fund;[6] (3) a "docket fee" of $35;[7] (4) a "time payment fee" of $25;[8] and (5) restitution amounting to $7,845, for a total of $8,192.50. Pet. App. 2a. While these charges have a variety of names, they are all levied only pursuant to a criminal conviction. Defendants who are not convicted do not have to pay.

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[5] *See* Colo. Rev. Stat. § 24-4.1-119(1)(a). The statute currently sets the cost at $163, but it was $125 when Nelson was convicted.

[6] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(I). The statute currently sets the surcharge at $163, but it was $162.50 when Nelson was convicted.

[7] *See* Colo. Rev. Stat. § 13-32-105(1).

[8] *See* Colo. Rev. Stat. § 16-11-101.6(1).

Nelson's convictions were reversed on appeal. Pet. App. 2a. On retrial, she was acquitted of all charges. Pet. App. 2a. The Colorado Department of Corrections had already taken $702.10 from her inmate account in partial payment of the amount she no longer owed to the state—$125 for the Crime Victim Compensation Fund, $162.50 for the Victims and Witnesses Assistance and Law Enforcement Fund, and $414.60 for restitution. Pet. App. 2a n.1.

Soon after her acquittal, Nelson filed a motion seeking the refund of this money. Pet. App. 2a. She argued that the failure to return the money would constitute a denial of due process under the federal Constitution. Pet. App. 2a. The trial court concluded that it lacked the authority to order the state to refund the $702.10 it had taken from Nelson. Pet. App. 70a-73a.

b. Petitioner Louis Alonzo Madden was convicted in 2005 of attempting to patronize a prostituted child and attempted sexual assault. Pet. App. 37a. In addition to a prison term, Madden's sentence included: (1) the $125 cost designated for Colorado's Crime Victim Compensation Fund; (2) the $125 surcharge designated for the Victims and Witnesses Assistance and Law Enforcement Fund; (3) the $30 docket fee; (4) the $25 time payment fee; (5) a $2,000 sex offender "surcharge";[9] (6) a $128 fee for genetic testing of sex offenders;[10] (7) a $1,000 special advocate "sur-

[9] *See* Colo. Rev. Stat. § 18-21-103(1).

[10] *See* Colo. Rev. Stat. § 16-11-102.4.

charge";[11] (8) a $45 fee for a "substance abuse assessment";[12] (9) a $25 fee for drug testing; and (10) $910 in restitution, for a total of $4,413. Pet. App. 37a. These charges, like the ones imposed on Nelson, are levied only on defendants who are convicted.

On direct appeal, Madden's conviction for attempted patronizing was reversed, leaving only his conviction for attempted assault. Pet. App. 37a. That conviction was vacated on state collateral review. Pet. App. 37a-38a. The prosecutor chose not to retry the case. Pet. App. 38a. Madden had already paid the state $1,220 in fees and $757.75 in restitution he no longer owed, for a total of $1,977.75. Pet. App. 38a.

Madden moved for a refund of these payments. He alleged that the failure to return the money would constitute a denial of due process under the Fourteenth Amendment. Pet. App. 75a. The trial court granted Madden's motion with respect to the $1,220 in fees, but denied the motion with respect to the $757.75 in restitution. Pet. App. 76a.

2. The Colorado Court of Appeals reversed in both cases. Pet. App. 50a, 64a. The Court of Appeals determined that state law required refunding all the money that Nelson and Madden had paid.

In Nelson's case, the Court of Appeals reasoned that both fees and restitution "must be tied to a valid conviction." Pet. App. 53a. Because Nelson's convic-

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[11] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(II)(A). The statute currently sets this surcharge at $1,300, but it was $1,000 when Madden was convicted.

[12] *See* Colo. Rev. Stat. § 18-1.3-209.

tions had been overturned, the court concluded, she was entitled to recover the amounts she had paid. Pet. App. 54a-57a. The Court of Appeals further concluded that Nelson could seek a refund in her pending criminal case without having to file a separate civil action. Pet. App. 57a-62a. The Court of Appeals noted that because it had ruled in Nelson's favor based on state law, it had no need to address her federal constitutional arguments. Pet. App. 62a.

The same panel of the Court of Appeals decided Madden's case on the same day. Pet. App. 64a. In a shorter opinion, the court applied the principles it had just elucidated in Nelson's case to conclude that Madden was also entitled to a refund of the amounts he had paid, and that he did not have to file a separate civil action. Pet. App. 65a-69a.

3. The Colorado Supreme Court reversed in both cases. Pet. App. 1a, 36a.

a. In Nelson's case, the court held that under state law, Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to -103, provides the exclusive remedy for people who seek refunds of monetary payments when their convictions are reversed. Pet. App. 14a-20a. The court explained that the judiciary could authorize refunds from public funds only pursuant to statutory authority, Pet. App. 17a, and that the Exoneration Act is the only statute addressing the circumstances under which courts may authorize such refunds, Pet. App. 19a. Under the Exoneration Act, the court observed, an exonerated person is entitled to a refund of fines, penalties, and restitution, along with other compensation, if she can "prove, by clear and convincing evidence, that she was 'actually inno-

cent.'" Pet. App. 12a (quoting Colo. Rev. Stat. §§ 13-65-101(1)(a) and 13-65-102(1)(a)). Because Nelson had not filed suit under the Exoneration Act, the court concluded that the trial court lacked the authority to order a refund. Pet. App. 20a.

The Colorado Supreme Court then turned to Nelson's contention that due process requires a refund. Pet. App. 20a. The court rejected this contention as well. "We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted," the court concluded. Pet. App. 20a. "The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." Pet. App. 20a.

Justice Hood dissented. Pet. App. 22a. He began by observing that "[b]ecause Nelson was never validly convicted, we presume she is innocent." Pet. App. 24a. Therefore, "just as the State was required to release Nelson from incarceration, it should also be required to release Nelson's money paid as costs, fees, and restitution." Pet. App. 25a. "I struggle," he explained, "to see how we can sanction a system that makes money immediately due without providing for its return when reversible error occurs." Pet. App. 25a.

Justice Hood concluded that the Exoneration Act is not an adequate remedy to comply with the requirements of due process. Pet. App. 28a. First, he explained, "requiring defendants who have never been validly convicted to resort to this Act flips the presumption of innocence. The Act establishes a sep-

arate civil claim that puts the burden on the petitioner to demonstrate her actual innocence by clear and convincing evidence." Pet. App. 28a.

Second, Justice Hood noted that "the Act is not geared toward refunds." Pet. App. 28a. He observed that the Exoneration Act provides, not just refunds, "but also $70,000 for every year of wrongful incarceration." Pet. App. 28a. "But Nelson is not seeking such broad relief; she is merely asking for a return to the status quo ante." Pet. App. 29a.

Third, Justice Hood explained that "the majority ignores the impracticability of bringing a separate civil action." Pet. App. 29a. Because defendants are not entitled to state-appointed counsel to bring claims under the Exoneration Act, "they must retain a lawyer or find one willing to work for free," both of which are unlikely prospects considering "the relatively low amounts available" when defendants merely seek the return of fees. Pet. App. 29a.

Finally, Justice Hood pointed out that the Exoneration Act provides no recourse whatsoever for defendants who have had money withheld due to misdemeanor convictions that have been reversed, because the Act only grants relief to people convicted of felonies. Pet. App. 29a n.1.

For these reasons, Justice Hood "respectfully disagree[d] with the majority's determination that the Exoneration Act provides 'sufficient process'" to comply with the requirements of the Due Process Clause. Pet. App. 29a.

b. The Colorado Supreme Court decided Madden's case on the same day. Pet. App. 36a. In a shorter

opinion, the court applied the principles it had just expounded in Nelson's case. The court again explained that under state law the Exoneration Act is the exclusive means of obtaining a refund of fees and restitution when a conviction is vacated, and that because Madden had not filed suit under the Exoneration Act, the trial court lacked the authority to grant a refund. Pet. App. 44a-45a.

Justice Hood again dissented. Pet. App. 45a.

The Colorado Supreme Court denied rehearing in both cases. Pet. App. 77a, 78a.

SUMMARY OF ARGUMENT

Colorado's scheme is contrary to due process, for several reasons.

First, Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. This flouts the most basic requirement of due process in criminal cases. In order to impose a criminal penalty, the state must prove each element of the crime beyond a reasonable doubt. Colorado has taken money from Nelson and Madden, but neither stands convicted of any crime. The Due Process Clause places the burden of proof on Colorado if it wishes to keep their money, not on Nelson and Madden to get it back.

Second, Colorado's scheme fails the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires consideration of (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of that interest, and (3) the government's interest. All three factors indicate that Colo-

rado's scheme is inconsistent with due process. People whose convictions are reversed have an undeniable property interest in obtaining a refund of fines, penalties, costs, and restitution. Colorado's scheme erroneously deprives them of their property in virtually all cases. Colorado has no legitimate interest in keeping this money, because there is no chance that Nelson or Madden will ever be re-prosecuted.

Third, Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld. The Court has repeatedly held that when a tax has been unlawfully collected, due process requires the state to provide a meaningful opportunity for taxpayers to secure refunds. The same principle applies here. A state cannot require monetary payments for criminal convictions and then, when the convictions are found unlawful, refuse to provide a meaningful procedure for defendants to secure refunds.

Fourth, Colorado's scheme is contrary to traditional practice. When a judgment is reversed, a person who paid money pursuant to that judgment has always been entitled to a refund. In this case, the Colorado Supreme Court abrogated the traditional rule by construing the Exoneration Act as the exclusive remedy for obtaining a refund of monetary payments when a conviction is reversed.

Fifth, there appears to be no other jurisdiction with a scheme like Colorado's. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed.

Finally, it does not matter what these payments are called. When a payment is made pursuant to a

conviction, the payment must be refunded when the conviction is reversed, whether the payment is called a "penalty," a "fine," a "fee," a "surcharge," "restitution," or anything else. Due process does not depend on mere labels.

ARGUMENT

Colorado violates the Due Process Clause by requiring a defendant whose conviction is reversed to prove her innocence by clear and convincing evidence to get a refund of monetary payments entailed by the conviction.

Colorado's scheme is contrary to due process, for several reasons. First, Colorado's scheme flouts due process by placing the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. Second, Colorado's scheme cannot be squared with the fundamental principles governing procedural due process. Third, Colorado's scheme is contrary to the Court's repeated admonition that the Due Process Clause requires states to provide a clear and certain remedy to recover money the state has wrongfully withheld. Fourth, Colorado's scheme is contrary to traditional practice in both civil and criminal cases, under which, when a judgment is reversed, courts have always ordered the refund of money paid to satisfy the judgment. Finally, Colorado's scheme is contrary to the practice of every other jurisdiction. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed.

These payments go by several different names under Colorado law—they are variously called "fines," "fees," "surcharges," "assessments," and "restitution." But it does not matter what they are called. Under any name, defendants only have to pay them pursuant to a conviction. When a conviction is reversed, money paid pursuant to that conviction must be refunded, just like money paid pursuant to any other judgment that is reversed.

A. Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties.

The most basic requirement of due process in criminal cases is that in order to impose a criminal penalty, the state must prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). The state may not shift its burden of proof to the defendant. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). In a criminal case, the Due Process Clause ensures that "a defendant has no obligation to prove his innocence." *District Attorney's Office v. Osborne*, 557 U.S. 52, 87 n.5 (2009) (Alito, J., concurring).

Colorado, by contrast, requires a defendant to prove her innocence. The state has taken $702.10 from Nelson and $1,977.75 from Madden, but neither stands convicted of any crime. To avoid these penalties, Nelson and Madden should not have to prove anything. The Due Process Clause places the

burden of proof on Colorado if it wishes to keep their money, not on Nelson and Madden to get it back.

Indeed, Colorado defendants must not only prove their innocence, but they must prove it by clear and convincing evidence, which the Court has repeatedly recognized as "a heavy burden." *Microsoft Corp. v. i4i Limited Partnership*, 564 U.S. 91, 102 (2011); *Cooper v. Oklahoma*, 517 U.S. 348, 361 (1996). The state may require defendants to satisfy this burden in order to recover in tort for having been wrongfully incarcerated (which is the primary purpose of the Exoneration Act). But the Due Process Clause bars the state from imposing this heavy burden on defendants who do not seek to recover in tort at all, but simply want a refund of monetary payments when their convictions have been reversed.

B. Colorado's scheme is contrary to fundamental principles governing procedural due process.

In determining whether a procedure complies with the Due Process Clause, the Court has often undertaken "[t]he three-part inquiry set forth in *Mathews v. Eldridge*," which requires consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used ... ; and the Government's interest." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Court has used the *Mathews* test to assess the adequacy of procedures collateral to the criminal process, such as the procedure set forth in Colorado's Exoneration Act. *See, e.g., Kaley v. United States*,

134 S. Ct. 1090, 1101-04 (2014); *id.* at 1110 n.4 (Roberts, C.J., dissenting); *James Daniel Good Real Property*, 510 U.S. at 53-59.

Here, all three factors indicate that Colorado's scheme is inconsistent with due process.

First, there is no doubt that people whose convictions have been reversed have a property interest in obtaining a refund of fines, penalties, costs, and restitution. It is their money, not Colorado's.

Second, Colorado's scheme poses an extraordinarily high risk—indeed, a near-certainty—of erroneously depriving such people of their property. Most people whose convictions are reversed cannot recover under the Exoneration Act, because they are unable to prove their innocence by clear and convincing evidence.

Third, the government's interest is non-existent. Colorado has no legitimate reason to keep money that rightly belongs to people whose convictions have been reversed. What the state is doing is far more egregious than the asset freezes the Court found unconstitutional in *Luis v. United States*, 136 S. Ct. 1083 (2016). There, the government at least had good reason to expect that the money it sought to restrain would one day be forfeitable by virtue of a criminal conviction. Here, by contrast, the criminal proceedings have already terminated in the defendants' favor, and there is no chance that either defendant will be re-prosecuted. This money will never belong to Colorado.

Colorado's scheme fails the three-part test of *Mathews v. Eldridge*. It serves no purpose other than

allowing the state to keep property that belongs to its citizens.

C. Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld.

The Due Process Clause requires states to provide a meaningful remedy for the recovery of money the state has wrongfully withheld. The Court's cases on this point have involved unlawfully collected taxes, but the principle applies equally to all money the state has wrongfully withheld, including money collected pursuant to a conviction that was unlawfully obtained.

Where a state has collected a tax that is subsequently determined to have been unlawful, "due process requires a 'clear and certain' remedy" for obtaining a refund. *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)). As the Court has repeatedly admonished, "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 22 (1990). *See also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930); *Ward v. Love Cty. Board of Comm'rs*, 253 U.S. 17, 24 (1920).

This principle applies equally to monetary payments collected by a state pursuant to a conviction that is subsequently reversed. Just as a state cannot collect a tax and then, when the tax is found unlaw-

ful, refuse to provide a meaningful procedure for taxpayers to secure refunds, a state cannot collect monetary payments for criminal convictions and then, when the convictions are found unlawful, refuse to provide a meaningful procedure for defendants to secure refunds. In both instances, the state is keeping property that belongs to its citizens. In both instances, the failure to provide a meaningful procedure is quite literally a deprivation of property without due process.

Colorado's Exoneration Act is not a "clear and certain" remedy for defendants to obtain refunds of monetary payments the state is wrongfully withholding. A defendant whose conviction has been reversed is entitled to a refund simply upon showing that her conviction has been reversed. Whether she can also prove that she is factually innocent, much less prove her innocence by clear and convincing evidence, is beside the point. Again, while the state may place obstacles in the path of defendants who seek to recover in tort for their wrongful incarceration, it may not place such obstacles in the path of those who merely want their money back when their convictions have been reversed.

Far from being a clear and certain remedy, Colorado's Exoneration Act is a complete barrier to relief in the vast majority of cases. The remedy provided in the Exoneration Act is available only to the very rare defendant who can prove her innocence by clear and convincing evidence. Colo. Rev. Stat. § 13-65-101(a). The Exoneration Act is not available at all to a defendant whose reversed conviction was for a misdemeanor or a defendant who served no prison time.

Id. § 13-65-102(1)(a). The one thing that is clear and certain about the Exoneration Act is that it is unavailable to the vast majority of defendants.

D. Colorado's scheme is contrary to traditional practice, under which the reversal of a judgment has always required the refund of money paid pursuant to that judgment.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Where a state abrogates "settled usages and modes of proceeding," *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 277 (1855), and where "the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor*, 512 U.S. at 430.

The traditional rule has always been that when a judgment is reversed, a person who paid money pursuant to that judgment is entitled to receive the money back. The Court has referred to this rule as "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919). As the Court explained, "[t]his right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had

judgment and execution, and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error be restored to all things which he ha[d] lost by occasion of the said judgment." *Id.* (citation and internal quotation marks omitted).

This traditional rule is so commonsensical that one can find it stated over and over again. *See, e.g.*, *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013) ("Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.") (citation and internal quotation marks omitted); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution."); *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891) ("The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period."); *Bank of the United States v. Bank of Washington*, 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost.").

See also Haebler v. Myers, 30 N.E. 963, 964 (N.Y. 1892) ("Restitution was ... exercised by the appellate tribunal as incidental to its power to correct errors,

and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof."); *Restatement (First) of Restitution* § 74 ("A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside."); William A. Keener, *A Treatise on the Law of Quasi-Contracts* 417 (1893) ("a party who has paid money upon a judgment which has been subsequently reversed, may sue in a count for money had and received to recover the money so paid"); Charles W. Tainter, 2d, *Restitution of Property Transferred Under Void or Later Reversed Judgments*, 9 Miss. L.J. 157, 159-61 (1936) ("Since the acquisition of property by the appellee arose solely by force of the reversed judgment and this judgment was erroneous, the courts require him to restore *in specie* any property of which he gained possession .... [T]he result is expressed as being simply the court undoing its own wrong.").

Criminal cases are no exception. Where the defendant has paid money as a result of a conviction, and the conviction was subsequently reversed, the defendant has always been entitled to have his money refunded. *See, e.g., Gonzalez v. State*, 68 Cal. App. 3d 621, 631 (Cal. Ct. App. 1977) ("[W]here a criminal conviction is set aside with the effect of finally disposing of the action, the defendant is entitled to a return of any fine imposed and there is a duty upon the public entity to which the fine was paid to return the fine on the basis that the retention of such monies will result in unjust enrichment."); *DeCecco v. United States*, 485 F.2d 372, 373-74 (1st Cir. 1973)

(where conviction reversed, ordering refund of fine); *People v. Abramowitz*, 229 N.Y.S. 467, 471 (N.Y. Ct. Spec. Sess. 1928) (same); *Lucas v. Commonwealth*, 41 Pa. C.C. 673, 675 (Pa. Ct. of Comm. Pleas 1914) (after conviction reversed, court orders that "restitution of the fines and costs be made to the defendants"); *United States v. Rothstein*, 187 F. 268, 269 (7th Cir. 1911) (after conviction reversed, agreeing with District Court that defendant "is of right entitled to the restitution of said $200 by him paid as a fine"); *New Jersey Society for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 117 (N.J. 1908) (after conviction reversed, court orders refund of $20 fine and $3.60 in costs); *People ex rel. McMahon v. Board of Auditors*, 49 N.W. 921 (Mich. 1879) (unpublished opinion; headnote reads "Where a judgment imposing a fine is reversed after a defendant has paid the fine in order to avoid imprisonment, *mandamus* will lie to the board of auditors to refund the fine."); *Merkee v. City of Rochester*, 13 Hun. 157, 162 (N.Y. Sup. 1878) (after conviction reversed, court orders "that the money which the plaintiff sued to recover was paid under the duress of a void judgment and could be recovered back"); *Devlin v. United States*, 12 Ct. Cl. 266, 272-73 (1876) (after conviction reversed, ordering government to refund $10,000 fine).

Colorado followed this traditional practice until this case. *See, e.g., Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing conviction, ordering that "the parties be placed in *status quo* by refund to the defendant of the sums paid as fine and costs"); *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1991) ("'a party against whom an erroneous judgment or decree has been carried into effect is

entitled, in the event of reversal, to be restored by his adversary to that which he has lost thereby'") (quoting *Arkadelphia Milling*, 249 U.S. at 145); *Denver & S.L.R. Co. v. Chicago, B. & Q.R. Co.*, 185 P. 817, 820 (Colo. 1919) ("The law is unquestioned that a party procuring a reversal of an erroneous judgment is entitled to restitution."); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo. Ct. App. 1993) ("a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution").

Now, however, the Colorado Supreme Court has abrogated this traditional rule by construing the Exoneration Act as the exclusive remedy for obtaining a refund of monetary payments when a conviction is reversed. Colorado has replaced a fair and sensible procedure with one that virtually ensures that defendants will not get their money back. By abrogating the traditional remedy, Colorado has denied defendants due process.

E. Colorado's scheme is contrary to the practice of every other jurisdiction.

There appears to be no other jurisdiction with a scheme like Colorado's. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed. They do not have to prove anything.

Several states mandate this result by statute. *See, e.g.*, N.Y. Penal Law § 60.35(4) ("Any person who has paid a mandatory surcharge, sex offender registration fee, DNA databank fee, a crime victim assistance fee or a supplemental sex offender victim fee

under the authority of this section based upon a conviction that is subsequently reversed ... shall be entitled to a refund."); Miss. Code § 99-19-73(12) ("The State Auditor shall establish by regulation procedures for ... refunds after appeals in which the defendant's conviction is reversed."); Cal. Penal Code § 1262 ("If a judgment against the defendant is reversed and the case is dismissed, or if the appellate court directs a final disposition of the action in defendant's favor, and defendant has theretofore paid a fine in the case, such act shall also be deemed an order of the court that the fine, including any penalty assessment thereon, be returned to defendant."); Del. Code tit. 11, § 4103(a) ("The State Treasurer shall remit to each person, or to the attorney of such person, who has paid a fine upon a conviction which was later set aside by a court of higher jurisdiction."); Tex. Code Crim. Proc. art. 103.008(a) ("On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending shall correct any error in the costs.").

In other jurisdictions, courts routinely refund monetary payments when convictions are reversed. *See, e.g.*, *Telink, Inc. v. United States*, 24 F.3d 42, 47 (9th Cir. 1994) ("If Telink and Burnup prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action and without regard to the limitations period for civil actions."); *Nakell v. Attorney General*, 15 F.3d 319, 322 (4th Cir. 1994) ("[I]t is the customary procedure of North Carolina courts to refund fines upon receiving notice that a conviction has

been overturned."); *In re Stewart*, 571 F.2d 958, 968 (5th Cir. 1978) (reversing conviction "with directions that the clerk be ordered to repay Stewart the fine he paid"); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines. This it could do without requiring the bringing of another action."); *United States v. Beckner*, 16 F. Supp. 2d 677, 678-79 (M.D. La. 1998) (holding that when a conviction is reversed, federal courts have authority to order the refund of restitution collected from the defendant and disbursed to victims); *United States v. Venneri*, 782 F. Supp. 1091, 1094-95 (D. Md. 1991) (same); *People v. Meyerowitz*, 335 N.E.2d 1, 7 (Ill. 1975) ("We hold that the defendants are entitled to a refund of the fines and costs they have paid as a result of their void convictions."); *Bogard v. State*, 450 S.W.3d 690, 692 (Ark. Ct. App. 2014) (after conviction reversed, directing that "any restitution already paid by Bogard to Whitwell be refunded"); *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Ct. App. 1980) (after conviction reversed, court should refund fine, restitution, and fees "as part of its inherent power to correct the effects of its own wrongdoing and restore the petitioner to the *status quo ante*"); *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012) (after conviction reversed, court has authority "to order the return of restitution erroneously paid").

Several courts have held, contrary to the view taken by the Colorado Supreme Court, that due process requires that defendants receive a refund of monetary payments when their convictions are re-

versed. The case often cited as providing the clearest discussion of this issue is *United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973), in which the court observed:

> The Fifth Amendment prohibition against the taking of one's property without due process demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of the prosecution.

Id. at 836.

With the exception of the Colorado Supreme Court, every other court to have addressed this question has agreed with *Lewis* that the Due Process Clause requires a refund of monetary payments when a conviction is reversed. *See Ex parte McCurley*, 412 So. 2d 1236, 1237-38 (Ala. 1982) (quoting this passage from *Lewis* and requiring a refund of fines and costs when a conviction is reversed); *State v. Piekkola*, 241 N.W.2d 563, 565 (S.D. 1976) (quoting this passage from *Lewis* and concluding that failure to refund the defendant's money "offends common sense and severely distorts the image of justice as fairness"), *overruled on other grounds*, *In re Estate of Erdmann*, 447 N.W.2d 356, 359 n.2 (S.D. 1989); *People v. Nance*, 542 N.W.2d 358, 359-60 (Mich. Ct. App. 1995) (quoting this passage from

Lewis and requiring reimbursement of money paid as a result of the defendant's conviction).[13]

The traditional rule is so sensible and fair, and Colorado's scheme is so clearly inconsistent with due process, that no other state requires defendants to prove their innocence to get their money back when their convictions are reversed.

Where a state is an extreme outlier, in failing to provide a procedure that all (or virtually all) other states provide, the Court has often determined that the state is violating the Due Process Clause. *See, e.g., Honda Motor*, 512 U.S. at 427 (Oregon violates due process by denying postverdict judicial review where "[e]very other State in the Union affords postverdict judicial review"); *Santosky v. Kramer*, 455 U.S. 745, 749-50 & n.3 (1982) (New York violates due process by using a preponderance standard in parental rights termination proceedings, where virtually every other state uses a higher standard). In determining what process is due, it makes obvious sense to use a consensus among the states as a benchmark. Due process is simply "the actual law of

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[13] In a few cases, courts have denied refunds where the person seeking the refund failed to serve the proper parties, *Hooper v. State*, 248 P.3d 748, 751 (Idaho 2011); *State v. Peterson*, 280 P.3d 184, 194 (Idaho Ct. App. 2012); *State v. Owens*, 118 Wash App. 1056, *3 (2003) (unpublished opinion); *State v. Sego*, 1995 WL 454020, *2 (Tenn. Ct. Crim. App. 1995) (unpublished opinion), and where the person seeking the refund obtained a benefit in exchange for the money, *People v. Noel*, 134 P.3d 484, 487 (Colo. Ct. App. 2005); *State v. Parker*, 872 P.2d 1041, 1049 (Utah Ct. App. 1994) (Davis, J., stating the view of the majority on this issue, *see id.* at 1042). Neither of these circumstances is present in our case.

the land." *Burnham v. Superior Ct.*, 495 U.S. 604, 619 (1990) (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)). A national consensus is the best evidence of what the law of the land actually is. As the Court has explained, "[a]lthough virtually unanimous adherence to [a particular procedure] may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" *Winship*, 397 U.S. at 361-62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

F. A state must refund all monetary payments pursuant to a conviction when that conviction is reversed, regardless of what those payments are called.

The money that Colorado collects pursuant to a conviction goes by a variety of names, including "fines," "fees," "costs," "surcharges," "assessments," "restitution," and so on. But it makes no difference what name Colorado uses for the money it collects. When a conviction is reversed, the state must refund all monetary payments required by the conviction, regardless of what those payments are called. A state cannot evade its constitutional obligations by changing the names it attaches to monetary exactions. *See United States v. United States Coin and Currency*, 401 U.S. 715, 718 (1971) ("From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct. In

both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force."). The process that is due does not depend on the state's choice of labels.

In its Brief in Opposition, Colorado asserted that the sums it refuses to refund should not be called "penalties." But it does not matter what they are called. They are charges that Colorado imposes only on people who are convicted of crimes. When convictions are reversed, the money no longer belongs to Colorado, whether it is called a "penalty," a "fine," a "fee," a "surcharge," or anything else. This case does not involve the various filing fees that courts impose on all litigants regardless of the outcome of a case. *See, e.g., United States v. Kras*, 409 U.S. 434 (1973). The case involves sums of money that Colorado collects only pursuant to a conviction. When a conviction is reversed, money paid pursuant to that conviction must be refunded, just like money paid pursuant to any other judgment that is reversed.

Below, Colorado argued that payments called "restitution" could not be refunded upon the reversal of a conviction, where, as here, the money had already been disbursed to victims. This argument is incorrect. Money is fungible. Where A owes a sum of money to B, A cannot defend by saying "Sorry, I already spent the money," even where A spent the money for a laudable purpose. Where a state has collected an unlawful tax, the tax must be refunded even if the state has already spent the proceeds. *McKesson*, 496 U.S. at 50 ("the State's interest in

financial stability does not justify a refusal to provide relief").

Moreover, it hardly needs saying that the reversal of a conviction means the defendant stands in the same position with respect to the alleged victims of a crime as everyone else in the world who was never charged with the crime. The defendant is no more responsible for compensating the victims than anyone else is.

Of the $702.10 that Colorado owes Shannon Nelson, the state has apparently already disbursed $414.60 to alleged victims. Of the $1,977.75 that Colorado owes Louis Madden, the state has apparently already disbursed $757.75 to alleged victims. Now that neither Nelson nor Madden stands convicted, whether the state has the right to recoup this money from the victims,[14] and whether that is a right the state would wish to exercise, are issues between the state and the victims. They have no bearing on whether the state owes this money to Nelson and Madden. A state cannot avoid its debt to one citizen by placing money in the possession of another.

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[14] Where a defendant is awarded compensation under the Exoneration Act, victims may keep the restitution payments they have already received. Colo. Rev. Stat. § 13-65-103(2)(e)(V). This provision does not govern in the much more common case, such as this case, where a defendant has not been awarded compensation under the Exoneration Act.

CONCLUSION

The judgments of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

Colo. Rev. Stat. §§ 13-65-101 to 13-65-103

Article 65
Compensation for Certain Exonerated Persons

§ 13-65-101. Definitions

As used in this article, unless the context otherwise requires:

(1)

(a) "Actual innocence" means a finding by clear and convincing evidence by a district court pursuant to section 13-65-102 that a person is actually innocent of a crime such that:

(I) His or her conviction was the result of a miscarriage of justice;

(II) He or she presented reliable evidence that he or she was factually innocent of any participation in the crime at issue;

(III) He or she did not solicit, pursuant to 18-2-301, C.R.S., the commission of the crime at issue or any crime factually related to the crime at issue;

(IV) He or she did not conspire, pursuant to 18-2-202, C.R.S., to commit the crime at issue or any crime factually related to the crime at issue;

(V) He or she did not act as a complicitor, pursuant to 18-1-603, C.R.S., in the commission of the crime at issue or any crime factually related to the crime at issue;

(VI) He or she did not act as an accessory, pursuant to 18-8-105, C.R.S., in the commission of the crime at issue or any crime factually related to the crime at issue; and

(VII) He or she did not attempt to commit, pursuant to 18-2-101, C.R.S., the crime at issue or any crime factually related to the crime at issue.

(b) A court may not reach a finding of actual innocence pursuant to this section merely:

(I) Because the court finds the evidence legally insufficient to support the petitioner's conviction;

(II) Because the court reversed or vacated the petitioner's conviction because of a legal error unrelated to the petitioner's actual innocence or because of uncorroborated witness recantation alone; or

(III) On the basis of uncorroborated witness recantation alone.

(c) As used in this subsection (1), "reliable evidence" may include but is not limited to exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence.

(2) "Custodial child" means any individual:

(a) Who was conceived or adopted prior to the date upon which the exonerated person was incarcerated for the act or offense that served as the basis for his or her conviction, which conviction and incarceration is the subject of his or her petition;

(b) Whose principal residence is the home of an exonerated person;

(c) Who receives more than half of his or her financial support from the exonerated person each year; and

(d) Who is either:

(I) Less than nineteen years of age at the end of the current year; or

(II) Less than twenty-four years of age at the end of the current year and a full-time student.

(3) "Exonerated person" means a person who has been determined by a district court pursuant to section 13-65-102 to be actually innocent.

(4) "Immediate family member" means a spouse, a parent, a child, a grandparent, or a sibling of a deceased person who would be eligible for relief pursuant to section 13-65-102 if he or she were alive. The provisions of article 11 of title 15, C.R.S., shall govern which immediate family member or members have proper standing to act as a petitioner.

(5) "Incarceration" means a person's custody in a county jail or a correctional facility while he or she serves a sentence issued pursuant to a felony conviction in this state or pursuant to the person's adjudication as a juvenile delinquent for the commission of one or more offenses that would be felonies if committed by a person eighteen years of age or older. For the purposes of this section, "incarceration" includes placement as a juvenile to the custody of the state department of human services or a county department of social services pursuant to such an adjudication.

(6) "Personal financial management instruction course" means a personal financial management instruction course that has been approved by the United States trustee's office pursuant to 11 U.S.C. sec. 111.

(7) "Petition" means a petition for compensation based on actual innocence filed pursuant to the provisions of section 13-65-102.

(8) "Petitioner" means a person who petitions for relief pursuant to section 13-65-102. "Petitioner" includes the immediate family members of a deceased person who would be eligible for relief pursuant to section 13-65-102 if he or she were alive.

(9) "Qualified health plan" means a health plan that satisfies the definition of a qualified health plan set forth in the federal "Patient Protection and Affordable Care Act", P.L. 111-148, 42 U.S.C. 18021(a)(1).

(10) "State's duty of monetary compensation" means the total amount of monetary compensation owed by the state to an exonerated person.

§ 13-65-102. Process for petitioning for compensation–eligibility to petition–actual innocence required–jurisdiction

(1)

(a) Notwithstanding the provisions of article 10 of title 24, C.R.S., a person who has been convicted of a felony in this state and sentenced to a term of incarceration as a result of that conviction and has served all or part of such sentence, or an immediate family member of such person, may be eligible for compensation as set forth in this article upon a

finding that the person was actually innocent of the crime for which he or she was convicted.

(b) A petition for compensation based on actual innocence filed pursuant to this section is a civil claim for relief.

(2) A petition may be filed pursuant to this section only:

(a) When no further criminal prosecution of the petitioner for the crimes charged, or for crimes arising from the same criminal episode in the case that is the subject of the petition, has been initiated by the district attorney or the attorney general and subsequent to one of the following:

(I) A court vacating or reversing all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence and following an order of dismissal of all charges; or

(II) A court vacating or reversing all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence and following an acquittal of all charges after retrial; and

(b) Either:

(I) If the conditions described in paragraph (a) of this subsection (2) are met on or after June 5, 2013, not more than two years after said conditions are met; or

(II) If the conditions described in paragraph (a) of this subsection (2) are met before June 5, 2013, not more than two years after June 5, 2013.

(3) The district court shall not declare a person to be actually innocent unless, based on evidence supporting the petitioner's allegation of innocence, including but not limited to an analysis of the person's DNA profile, the court determines that:

(a) The person committed neither the act or offense that served as the basis for the conviction and incarceration that is the subject of the petition, nor any lesser included offense thereof; and

(b) The person meets the definition of actual innocence in section 13-65-101(1).

(4)

(a) A petitioner is not eligible for compensation pursuant to this article if:

(I) He or she does not meet the definition of actual innocence in section 13-65-101(1);

(II) He or she committed or suborned perjury during any proceedings related to the case that is the subject of the claim; or

(III) To avoid prosecution in another case for which the petitioner has not been determined to be actually innocent, he or she pled guilty in the case that served as the basis for the conviction and incarceration that is the subject of the petition.

(b) Notwithstanding subparagraphs (I) to (III) of paragraph (a) of this subsection (4), conduct described in said subparagraphs shall not include a confession or an admission that was later determined by a court of competent jurisdiction, or by

stipulation of the parties, to be false or coerced by any governmental agent.

(5)

(a) A petitioner shall file his or her petition in the district court in the county in which the case originated, to the district court judge who presided over the original proceeding if such judge is available; except that, if either party objects to such judge presiding over this civil claim for relief, then another district judge of the district court shall preside over the matter.

(b) The petition shall name the state of Colorado as the respondent. The attorney general and the district attorney of the judicial district in which the case originated shall each have a separate and concurrent authority to intervene as parties to a petition, and a copy of the petition shall be served on the attorney general and the district attorney.

(c) A petition shall contain a recitation of facts necessary to an understanding of the petitioner's claim of actual innocence. The petition may be supported by DNA evidence, if applicable, expert opinion, previously unknown or unavailable evidence, and the existing court record. The petitioner shall attach to the petition:

(I) A copy of any expert report relied upon by the petitioner to support his or her claim of actual innocence;

(II) Any documentation supporting the recitation of facts in the claim;

(III) A record from the county jail, state correctional facility, or other state facility documenting the amount of time that the petitioner was incarcerated; and

(IV) A sworn affidavit of the petitioner asserting his or her actual innocence as defined in section 13-65-101(1).

(d) Upon receipt of a petition, the attorney general and the district attorney shall each have sixty days to file a response in the district court. A joint response may be filed. The court may grant the responding party, for good cause shown, no more than one extension of time, not exceeding forty-five days, in which to file a response. The response shall contain a statement that:

(I) Based upon the petition and verifiable and substantial evidence of actual innocence, no further criminal prosecution of the petitioner for the crimes charged can or will be initiated by the district attorney or the attorney general, that no questions of fact remain as to the petitioner's actual innocence, and that the petitioner is eligible to seek compensation under the provisions of this section; or

(II) The responding party contests the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner's alleged wrongful conviction, or whether the petitioner is eligible to seek compensation under the provisions of this section. The response shall include a recitation of facts necessary to an understanding as to why the petition is being contested.

(e) If the responding party contests the actual innocence of the petitioner, the district court may order that the responding party be allowed to retest any evidence at issue in the claim if such evidence remains to be tested and testing such evidence will not consume the remainder of the sample.

(f)

(I) If a petition is contested, the petitioner shall ensure that the district court has, or has available, the transcript from the original trial if the petitioner was convicted at trial, the post-conviction motion or appeal that resulted in a dismissal of the case that is the subject of the petition and the transcript of any hearings associated with such motion or appeal; and any other pleadings or transcripts from proceedings that the petitioner seeks the district court to consider.

(II) The district court shall use any transcripts that are within the court records for the judicial district of any proceeding involving the case that is the subject of the petition that the petitioner or the respondent wants the district court to consider.

(g) Except as otherwise provided in this section, the Colorado rules of civil procedure shall apply to petitions filed pursuant to this section. The district court may consider any relevant evidence regardless of whether it was admissible in, or excluded from, the criminal trial in which the petitioner was convicted. No evidence shall be excluded on grounds that it was seized or obtained in violation of the United States constitution or the state constitution. The district court may consider the ongo-

ing investigation and prosecution of any other individual for the crimes committed when determining the timing and scope of the hearing if the claim is uncontested or the trial if the claim is contested.

(6) As soon as practicable given the unique circumstances of claims filed pursuant to this section, the district court shall act as follows:

(a) Upon receipt of an uncontested response to a petition, the district court shall issue a final order on the petition, finding that the petitioner is actually innocent. If the district court issues a final order pursuant to this paragraph (a), the district court shall include directions to the state court administrator to act as described in section 13-3-114.

(b) Upon receipt of a response contesting the petitioner's declaration of actual innocence or his or her eligibility for compensation regardless of petitioner's claim of actual innocence, or both, the district court shall set the matter for a trial to the district court or, at the written election of either party, to a trial to a jury of six, at which trial the burden shall be on the petitioner to show by clear and convincing evidence that he or she is actually innocent of all crimes that are the subject of the petition, and that he or she is eligible to receive compensation pursuant to this article. A trial to a jury of six must result in a unanimous verdict. Following a trial to the district court, the court shall issue a final order on the petition, which order shall include findings of fact as to whether the petitioner has established by clear and convincing evidence that he or she is actually innocent and whether the

petitioner is eligible for compensation under this article. If the court finds that the petitioner is actually innocent and eligible for compensation pursuant to this article, the district court shall issue a final order awarding the petitioner compensation pursuant to section 13-65-103. Upon a finding by a jury of actual innocence, the district court shall also issue an order awarding the petitioner compensation pursuant to section 13-65-103.

(7)

(a) Either party has a right to an appeal.

(b) If the petitioner appeals the amount of compensation awarded, the state court administrator shall not delay in paying the petitioner pursuant to the directions of the district court while the appeal is pending.

(c) If the attorney general or a district attorney appeals the outcome of the trial described in subsection (6) of this section, the state court administrator shall not delay in paying the petitioner pursuant to the directions of the district court while the appeal is pending.

(d) In the event that the attorney general or district attorney prevails in an appeal, the court may take such action as is necessary to recover the amount of any compensation awarded to the petitioner pursuant to section 13-65-103.

§ 13-65-103. Compensation for certain exonerated persons–monetary compensation–financial literacy training–penalty for lack of a qualified health plan–expungement of records--damages awarded in civil actions

(1) Except as otherwise provided in this article, a district court shall direct the state court administrator to compensate an exonerated person, or an immediate family member of an exonerated person, who is determined by a district court pursuant to section 13-65-102 to be actually innocent and eligible to receive compensation pursuant to this article.

(2) A district court that directs the state court administrator to compensate an exonerated person or an immediate family member of an exonerated person pursuant to this section shall reduce the directions to writing and include within the directions:

(a) The exonerated person's name;

(b) The date upon which the order is issued;

(c) The felony or felonies, if any, of which the exonerated person has been exonerated and each conviction or adjudication of the exonerated person, if any, that has been vacated or reversed;

(d) The date upon which the exonerated person was convicted or adjudicated and the dates during which the exonerated person was incarcerated as a result of such conviction or adjudication;

(e) A statement that the exonerated person, or the immediate family member of the exonerated person, is entitled to compensation from the state, which compensation shall include:

(I) An award of monetary compensation, as described in subsection (3) of this section;

(II) Tuition waivers at state institutions of higher education for the exonerated person and for any children and custodial children of his or hers who were conceived or legally adopted before the exonerated person was incarcerated or placed in state custody for the offense of which he or she has been exonerated, as described in section 23-1-132, C.R.S.; except that:

(A) No other immediate family members of the exonerated person shall be eligible for such tuition waivers; and

(B) Notwithstanding any other provision of this section, neither an exonerated person nor a child or custodial child of an exonerated person shall be eligible for a tuition waiver pursuant to this subparagraph (II) unless the exonerated person was wrongfully incarcerated for at least three years.

(III) Compensation for child support payments owed by the exonerated person that became due during his or her incarceration or placement in state custody, and interest on child support arrearages that accrued during his or her incarceration or placement in state custody but which have not been paid;

(IV) Reasonable attorney fees for bringing a claim under this section; and

(V) The amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful

conviction or adjudication. This subparagraph (V) shall not be interpreted to require the reimbursement of restitution payments by any party to whom the exonerated person made restitution payments as a result of his or her wrongful conviction or adjudication.

(f) A statement notifying the person and the state court administrator that, pursuant to section 24-30-209(4), C.R.S., the exonerated person is required to complete a personal financial management instruction course before the state court administrator may issue to the exonerated person more than one annual payment of monetary compensation;

(g) A statement notifying the exonerated person and the state court administrator that, pursuant to section 13-3-114, in each year in which an exonerated person receives any annual payment from the state court administrator, the exonerated person's annual payment shall be reduced by ten thousand dollars if the exonerated person fails to present to the state court administrator a policy or certificate showing that the exonerated person has purchased or otherwise acquired a qualified health plan for himself or herself and his or her dependents that is valid for at least six months.

(3)

(a) Except as limited by the provisions of this article, an exonerated person shall receive monetary compensation in an amount of seventy thousand dollars for each year that he or she was incarcerated for the felony of which he or she has been exonerated. In addition to this amount, an exonerat-

ed person shall receive compensation in an amount of:

(I) Fifty thousand dollars for each year that he or she was incarcerated and sentenced to execution pursuant to part 12 of article 1.3 of title 18, C.R.S.; and

(II) Twenty-five thousand dollars for each year that he or she served on parole, on probation, or as a registered sex offender after a period of incarceration as a result of the felony of which he or she has been exonerated and not for any other criminal offense.

(b) Except as limited by the provisions of this article, in addition to the amount described in paragraph (a) of this subsection (3), an exonerated person shall receive compensation in a prorated amount that is proportionate to the length of:

(I) Each partial year that he or she was incarcerated or placed in state custody;

(II) Each partial year that he or she was incarcerated and sentenced to execution pursuant to part 12 of article 1.3 of title 18, C.R.S.; and

(III) Each partial year that he or she served on parole, on probation, or as a registered sex offender after a period of incarceration as a result of the felony of which he or she has been exonerated and not for any other criminal offense.

(4) A court that directs the state court administrator to compensate an exonerated person or an immediate family member of an exonerated person shall submit copies of the directions to:

(a) The exonerated person or immediate family member of the exonerated person;

(b) The state court administrator;

(c) The attorney general;

(d) The district attorney of the judicial district in which the case originated;

(e) The state department of corrections;

(f) The state department of labor and employment;

(g) The state department of revenue; and

(h) The Colorado commission on higher education.

(5) Notwithstanding any provision of this article to the contrary, a court shall not direct the state court administrator to compensate any exonerated person or immediate family member of an exonerated person for any period of incarceration during which the person was concurrently serving a sentence for an offense of which he or she has not been exonerated.

(6) The amount of monetary compensation awarded to an exonerated person pursuant to this section shall not be subject to:

(a) Any cap applicable to private parties in civil lawsuits; or

(b) Any state income tax, except as to those portions of the judgment awarded as attorneys' fees for bringing a claim under this section as described in section 39-22-104(4)(q), C.R.S.

(7)

(a) A court that directs the state court administrator to compensate an exonerated person or an im-

mediate family member of an exonerated person shall order all records relating to the exonerated person's wrongful conviction or adjudication to be expunged as if such events had never taken place and such records had never existed. The court shall direct such an expungement order to every person or agency that may have custody of any part of any records relating to the exonerated person's wrongful conviction or adjudication.

(b) If a court issues an expungement order pursuant to paragraph (a) of this subsection (7), a court, law enforcement agency, or other state agency that maintains records relating to the exonerated person's wrongful conviction or adjudication shall physically seal such records and thereafter treat the records as confidential. Records that have been sealed pursuant to this subsection (7) shall be made available to a court or a law enforcement agency, including but not limited to a district attorney's office or the attorney general, upon a showing of good cause.

(8)

(a) A court that directs the state court administrator to compensate an exonerated person or an immediate family member of an exonerated person shall reduce the exonerated person's award of monetary compensation, as described in paragraph (b) of this subsection (8), if, prior to the issuance of the award:

(I) The exonerated person prevails in or settles a civil action against the state or against any other government body in a civil action concerning the

same acts that are the bases for the petition for compensation; and

(II) The judgment rendered in the civil action or the settlement of the civil action includes an award of monetary damages to the exonerated person.

(b) Under the circumstances described in paragraph (a) of this subsection (8), the court shall reduce an exonerated person's award of monetary compensation by an amount that is equal to the amount of monetary damages that the exonerated person is awarded and collects in the civil action; except that a court shall not offset any amount exceeding the total amount of monetary compensation awarded to the exonerated person pursuant to this section.

(9)

(a) Except when procured by fraud, a court's finding that a person is actually innocent and eligible for compensation pursuant to this article shall be deemed a final and conclusive disposition of the matter of the exonerated person's wrongful incarceration or placement in state custody.

(b) A court's finding that a person is actually innocent and eligible for compensation pursuant to this article shall not be interpreted to limit the person's ability to pursue an action for damages against an entity that is not an employee, agent, or agency of the state government.

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DEC 14 2016
OFFICE OF THE CLERK

No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,
Petitioners,

v.

COLORADO,
Respondent.

On Writ of Certiorari
to the Colorado Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does a criminal defendant have a constitutional right to an automatic, unqualified monetary judgment against the State for amounts paid pursuant to a conviction that is later invalidated?

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STATEMENT

Petitioners were convicted of sexual crimes against children, sentenced to a term of imprisonment, and ordered to pay various costs and fees. They were also ordered to pay restitution for the losses their victims suffered. Although they had the right to do so, they did not contest their restitution orders.

While in prison, Petitioners paid a portion of their costs, fees, and restitution. Their convictions were subsequently invalidated on direct appeal or in post-conviction proceedings, and they sought refunds for the amounts they had paid. The state courts denied them relief because no Colorado statute grants automatic refunds in these circumstances; instead, state law provides full compensation for criminal defendants who are innocent of wrongdoing.

Here, Petitioners assert that the Due Process Clause grants criminal defendants an automatic right to compensation for monetary amounts paid pursuant to convictions that are later overturned.

I. Factual and procedural background.

Petitioner Nelson. Nelson was charged with subjecting her four minor children to aggravated incest, sexual assault, and child abuse over a five-year period. *Nelson*, R. Court File Vol. 1 at 32–42. The arrest-warrant affidavit alleged that the children had disclosed the abuse in recorded forensic interviews. *Id.* at 30.

Nelson was appointed counsel. *Id.* at 131, 137. At the preliminary hearing, the court found probable cause on all counts. J.A. 2. After a year of motions

hearings and discovery, the court held a nine-day trial that included the testimony of 14 witnesses and the child-victims. J.A. 3–5. The forensic interviews, which were played to the jury, provided evidence that Nelson had forced her children to engage in sexual acts and had beaten them. *See Nelson*, R. People's Ex. 11–12, 14, 16–17, Env. 1. The jury convicted Nelson on five counts of sex assault, aggravated incest, and child abuse. J.A. 6–7.

The court sentenced Nelson to a prison term and ordered her to pay court costs, fees, and restitution. J.A. 8. The purpose of the restitution order was to pay for mental health therapy for Nelson's children. J.A. 29–31; *Nelson*, R. Court File Vol. 2 at 323–37. Nelson did not contest the order,[1] and while she was incarcerated, the prison withheld about $700[2] from her inmate account to pay toward her balance. J.A. 44.

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[1] Restitution compensates a victim for pecuniary loss that was proximately caused by an offender's conduct and operates as a final civil judgment in favor of the State and any victim. COLO. REV. STAT. § 18-1.3-603(3)(a), (4)(a). Defendants are entitled to notice and an opportunity to contest the imposition of restitution. *People v. Mata*, 56 P.3d 1169, 1176 (Colo. App. 2002). The prosecution must prove by a preponderance of the evidence that the defendant proximately caused the victim's losses. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006).

[2] Nelson paid $125 to the victim compensation fund, $162.50 to the victim's assistance fund, $35 in court costs, and a $25 time payment fee. J.A. 39. These amounts were assessed to provide compensation for and services to victims and witnesses and to defray the costs of the judicial system. Pet. App. 5a–11a, 41a–42a (describing the statutory authority for various monetary assessments and how they must be allocated). Nelson paid $390.67 in restitution. J.A. 39.

After Nelson was convicted, the prosecution charged Nelson's brother and his wife with sexually assaulting the children in concert with Nelson. Those cases proceeded separately. *Nelson*, R. Court File Vol. 3 at 468, 481–84, 487. Nelson's brother pleaded guilty in *People v. Roy Nelson*, No. 06 CR 2357; he did not appeal. *Nelson*, R. Court File Vol. 3 at 487. His wife's jury-trial conviction, which resulted in a sentence of 32 years to life in prison, was affirmed on appeal. *Id.*; *People v. Lacie Dawn Nelson*, No. 09CA0958, 2012 WL 1883813 (Colo. App. May 24, 2012), *cert. denied*, No. 12SC468, 2012 WL 5384099 (Colo. Nov. 5, 2012).

On direct appeal of Nelson's conviction, the Colorado Court of Appeals reversed and remanded for a new trial because the trial court had allowed the prosecution to call an unendorsed expert witness. *People v. Gonser*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009). On retrial, which occurred seven years after the alleged crimes took place, Nelson was acquitted on all counts, and the court entered a judgment of acquittal. J.A. 36.

Eight months later, Nelson filed a motion in her criminal case asking for return of the funds withheld from her inmate account. J.A. 37; *Nelson*, R. Court File Vol. 4 at 910. The trial court denied Nelson's motion, concluding that none of the funds had been "wrongfully taken" because at the time they were withdrawn from her inmate account, Nelson had been convicted and her conviction had not yet been reversed. The court found that the restitution had already been disbursed to pay for the children's mental health therapy and concluded that it lacked authority to order the prosecution to repay those amounts. Pet. App. 71a–73a.

Petitioner Madden. Madden was charged with attempted patronizing of a prostituted child, attempted third-degree sexual assault, and attempted sexual assault on a child. *Madden*, R. Court File Vol. 1 at 6. The arrest-warrant affidavit alleged that Madden propositioned a 14-year-old girl who was a passenger on the trolley he was driving, then pinned her against a window and sexually assaulted her. *Id.* at 11. When he was arrested, he allegedly confessed to the crime. *Id.*

Madden was appointed counsel. *Madden*, R. Court File Vol. 1 at 24. At the preliminary hearing, the trial court found probable cause on the first two counts but dismissed the third count. J.A. 46. After a three-day trial at which the victim and several witnesses testified, Madden was convicted and sentenced to prison. He was ordered to pay costs, fees, and surcharges, as well as $910 in restitution to cover the victim's mental health therapy expenses. J.A. 56–61. He did not challenge the restitution order and ultimately paid approximately $2,000[3] toward his total balance. J.A. 78.

On direct appeal, the court of appeals affirmed the conviction for attempted patronizing but reversed the attempted sexual assault conviction. *People v. Madden,* 87 P.3d 153 (Colo. App. 2003). The Colorado Supreme Court came to the opposite conclusion, affirming Madden's attempted sexual assault conviction but reversing the attempted patronizing count. *People v. Madden,* 111 P.3d 452 (Colo. 2005). On remand, the

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[3] Madden paid $1,000 as a special advocate surcharge, $95 to the victim's assistance fund, $125 to the victim compensation fund, and $757.75 in restitution. J.A. 78–79.

trial court imposed a three-year prison sentence with credit for time served. J.A. 66–67.

Madden then filed a post-conviction motion, alleging ineffective assistance of trial counsel. J.A. 68. After a hearing, the court found that significant, properly admitted evidence pointed to Madden's guilt. J.A. 74. But the court reversed the conviction because Madden's attorney committed various errors during trial, including introducing damaging testimony about Madden's previous sexual behavior. J.A. 70–72. Madden had by then served his sentence of incarceration, and the district attorney elected not to appeal the order or retry the case. J.A. 75.

Madden requested a refund of the approximately $2,000 in costs, fees, and restitution that he had paid. J.A. 77–80. After a hearing, the trial court ordered that the costs and fees be refunded, but denied the motion as to restitution, which had already been distributed to pay for counseling services for the victim. Pet. App. 75a–76a.

II. Decisions of the Colorado Court of Appeals and Supreme Court.

Colorado Court of Appeals. Both Petitioners appealed the denial, or partial denial, of their refund motions. The court of appeals reversed in both cases.

In *Nelson*, the court of appeals held that a defendant whose conviction is overturned on appeal is entitled to a return of monetary amounts paid pursuant to that conviction, if the defendant is subsequently acquitted or the prosecution declines to retry the case. Pet. App. 50a. The court concluded that this compensation must include restitution that "has

already [been] disbursed to third parties." *Id.* at 54a, 61a. Although the court acknowledged that its decision implicated public policy issues within the province of the legislature, it nonetheless remanded the case for the trial court to "consider on the merits" Nelson's motion for refund. *Id.* at 62a–63a.

In *Madden*, the court of appeals adhered to the *Nelson* decision, explaining that its holding applied both to convictions overturned on direct appeal and to convictions invalidated during post-conviction proceedings. Pet. App. 67a.

Colorado Supreme Court. The Colorado Supreme Court reversed in both cases.[4] Pet. App. 1a.

In *Nelson*, the majority reasoned that "[j]ust as [a] court must follow statutory commands in imposing and disbursing fees, the court may authorize refunds from public funds only pursuant to statutory authority." Pet. App. 17a. The court explained that "[n]one of the statutes governing costs, fees, and restitution address whether a court may withdraw money from public funds to refund money that a defendant has already paid." *Id.* at 19a. Reading those statutes to permit such refunds, the court explained, would "intrude on the legislature's powers." *Id.* at 17a.

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[4] The People sought certiorari to review only the portions of the court of appeals decisions involving restitution. It did not seek review of the portions upholding, or ordering, refunds of costs and fees. *People v. Nelson*, No. 13SC495, People's Pet. for Writ of Cert. (July 26, 2013); *People v. Madden*, No. 13SC496, People's Pet. for Writ of Cert. (Colo. Aug. 5, 2013). The Colorado Supreme Court nonetheless reviewed all portions of the court of appeals decisions.

The court observed, however, that a separate Colorado statute does provide a mechanism for criminal defendants to seek reimbursement: a defendant may obtain compensation through the Colorado Exoneration Act, which "specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution." Pet. App. 17a. Because Nelson did not file a claim under the Exoneration Act, "the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution based on her motion following her criminal trial." *Id.* at 20a.

The majority rejected Nelson's claim that "due process required an automatic refund of costs and fees that she had paid." Pet. App. 20a. The court explained that the money withheld from Nelson's prison account "was not wrongfully withheld because a conviction supported the imposition of costs, fees, and restitution" and that "Nelson was obligated to pay only while her conviction was in place[,] and this obligation was imposed pursuant to a valid statute." *Id.* at 21a. Because "[d]ue process does not require a defendant to be compensated automatically for the time she spent incarcerated," it likewise "does not require an automatic refund." *Id.* at 22a. The compensation mechanism made available by the Exoneration Act, the court held, "provides sufficient process for defendants to seek a refund of costs, fees, and restitution that they incurred while a conviction was in place." *Id.* at 22a.

One justice dissented, arguing that Colorado trial courts have authority to order refunds through the doctrine of "ancillary jurisdiction." Pet. App. 30a. He further contended that the Exoneration Act does not

provide sufficient process for defendants in Nelson's situation because the Act "is not geared toward refunds" and "provides a different remedy" from the automatic compensation Nelson was seeking. *Id.* at 28a–29a.

In *Madden*, the majority adhered to its companion opinion in *Nelson*. Pet. App. 39a. It did not address any due process arguments, because Madden did not raise them. The same justice who dissented in *Nelson* wrote a dissent in *Madden*, reiterating his reasoning.

III. The Colorado Exoneration Act.

Colorado's Exoneration Act provides a civil remedy through which exonerated persons may obtain compensation from the State. COLO. REV. STAT. § 13-65-101. The Act is funded by general-fund appropriations allocated to the judicial department. *See* 2013 Colo. Sess. Laws 2426–27.

To establish exoneration, the district court must find that the defendant was actually innocent of the relevant crimes and did not participate in them. COLO. REV. STAT. § 13-65-101(1)(a)(I)–(VII). A court may not reach a finding of actual innocence if the conviction was reversed or vacated because of legal insufficiency or a legal error unrelated to actual innocence. COLO. REV. STAT. § 13-65-101(1)(b)(I)–(III), (3). A person is likewise ineligible for compensation if he or she committed or suborned perjury during proceedings related to the case. COLO. REV. STAT. § 13-65-102(4)(a)(II).

The statute provides successful claimants compensation for each year of incarceration, as well as for any fine, penalty, court costs, or restitution paid as a result of the wrongful conviction. COLO. REV. STAT.

§ 13-65-103(2)(e)(V). It also includes a fee-shifting provision, providing reasonable attorney fees for bringing a successful claim. COLO. REV. STAT. § 13-65-103(2)(e)(IV).

SUMMARY OF ARGUMENT

I. Petitioners' constitutional claim, although couched in procedural terms, depends on the assumption that criminal defendants have a substantive due process right to an automatic, unqualified judgment against the State for monetary amounts paid pursuant to an overturned conviction. Yet Petitioners neither clearly describe the contours of that claimed substantive right nor establish that it is deeply rooted in historical tradition. They have therefore failed to establish that the substantive due process doctrine grants them the right they seek to enforce in this case.

II. Petitioners' claim also fails under the analysis that applies to questions of procedural due process.

A. The procedural claim at issue here is governed by *Medina v. California*, 505 U.S. 437 (1992), and *Patterson v. New York*, 432 U.S. 197 (1977), not *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioners seek to mandate, as part of the criminal process, a compensatory mechanism for criminal defendants whose convictions are overturned. Because the *Medina–Patterson* test applies to procedures within the criminal process, it governs this case.

B. Petitioners' claim fails the *Medina–Patterson* test. There was no settled historical right to an automatic, unqualified monetary judgment against the State any time a criminal defendant's conviction was overturned, and the procedures of Colorado's Exoneration Act do not offend fundamental fairness in operation.

C. Alternatively, this Court may avoid deciding whether the *Medina–Patterson* test applies here because Petitioners' claim fails the three-pronged *Mathews* test as well. First, because Petitioners' right to compensation is contingent and equitable, the State need only provide them an ordinary judicial process such as a civil action for damages. Second, Colorado minimizes the risk that criminal defendants will be inequitably deprived of property or liberty through numerous pre- and post-deprivation procedures. These procedures are effective, as statistics from Colorado's judicial branch demonstrate. Third, Colorado has an interest in ensuring that compensation paid to criminal defendants comports with notions of equity. The Exoneration Act serves that interest; Petitioners' claimed automatic right to compensation does not.

III. Petitioners' other miscellaneous arguments are flawed. *First*, Petitioners' characterization of modern practice is inaccurate, and they cannot demonstrate the sort of overwhelming consensus in favor of their position that would require setting aside the standard due process analysis. *Second*, Petitioners' reliance on cases decided in the tax context ignore that, in those cases, the government denied any pre-deprivation process. Those cases do not apply to the criminal context, in which defendants' rights are protected by numerous specialized procedures. *Third*, Colorado bears the burden to prove criminal liability beyond a reasonable doubt. Petitioners' argument to the contrary fails to distinguish between criminal trials and procedures for awarding compensation to criminal defendants. *Fourth*, the monetary assessments at issue here cannot all be described as fines or penalties. They each serve distinct purposes unrelated to criminal

punishment. Most significantly, Petitioners fail to recognize the unique nature of restitution, for which Petitioners' proposed automatic refunds are particularly inappropriate.

ARGUMENT

I. The Constitution does not grant a substantive right to an automatic monetary judgment against the State when a criminal conviction is overturned or vacated.

In attempting to present this case as a purely procedural dispute, Petitioners avoid grappling with a dispositive predicate question. Namely, they fail to identify the source of a *substantive* right to a monetary judgment against the State that attaches when a conviction is overturned. This question is both legally distinct from, and logically antecedent to, Petitioners' procedural claim, and it must be analyzed separately. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755–56 (2005) (explaining that "[t]he procedural component of the Due Process Clause" does not apply to all asserted property interests or benefits, but only to those entitlements that are protected by "an independent source" such as state law or principles of substantive due process); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, ... [w]e must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.").

Because the arguments presented in this appeal are based entirely on due process, *see* Pet'r Br. i (raising only a due process claim), Petitioners implicitly claim that their asserted substantive right is founded in the Due Process Clause. Thus, before considering Petitioners' procedural arguments, this Court must first decide if their claimed entitlement to an automatic

monetary judgment against the State falls within the ambit of the substantive due process doctrine. *See Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality opinion) (affirming dismissal because the substantive due process doctrine did not encompass the petitioner's claimed right to freedom from prosecution without probable cause).

The substantive component of the Due Process Clause is carefully constrained; it reaches only "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). "[G]uideposts for responsible decision making in [the area of substantive due process] are scarce and open-ended" and "[t]he doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever [it is] asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). This Court has "always been reluctant to expand the concept of substantive due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quotation omitted).

Consequently, Petitioners must satisfy a demanding two-pronged test to demonstrate that they have a substantive due process right to an automatic monetary judgment against the State. Their claimed right must be both (1) clearly described and (2) "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721 (quotation omitted). Here, Petitioners fail both prongs of the analysis.

A. Petitioners have not "clearly described" their asserted right to an automatic monetary judgment against the State.

Petitioners broadly claim that "[a] defendant whose conviction has been reversed is entitled to a refund simply upon showing that her conviction has been reversed." Pet. Br. 25. Petitioners do not define the particular contours of this asserted right. *See Glucksberg*, 521 U.S. at 721 (requiring a "careful description" of an asserted substantive right); *Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003) (opinion of Thomas, J.) ("[V]ague generalities ... will not suffice."). Instead, they claim that their asserted right is generalized, automatic, and unqualified.

Petitioners fail to identify the party or state agency against whom any monetary judgment could attach, or why that judgment would not be subject to sovereign immunity. *See, e.g., United States v. Mossew*, 268 F. 383, 384–85 (N.D.N.Y 1920). Petitioners fail to differentiate between compensation for fines and penalties (which are paid as punishment for the offense), compensation for criminal fees (which are disbursed to various state funds administered by various state entities[5]), and compensation for restitution (which is not retained by the State but is instead disbursed to victims[6]). *See infra* Section III.D.

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[5] *See* Pet. App. 5a–7a, 9a–11a (explaining to whom and how various assessments must be allocated).

[6] *See* COLO. REV. STAT. § 18-1.3-601(2) ("It is the intent of the general assembly that restitution be ordered, collected, and disbursed to the victims of crime and their immediate families.").

Petitioners fail to explain why their right to compensation is automatic rather than contingent or equitable. *See People v. Bandy*, 239 Ill. App. 273, 278–79 (1925) (holding that compensation for monetary payments is equitable). Finally, Petitioners do not explain why the Constitution grants them compensation only for the *monetary payments* they made pursuant to their convictions, while ignoring their loss of liberty during their time of incarceration. They simply assert—without any legal support or explanation—that any compensation for that particular deprivation falls outside the substantive constitutional right they seek to create through this case. Pet. Br. 22, 25 (conceding that Colorado defendants may be required to seek compensation for loss of liberty through the Exoneration Act and, consequently, that there is no automatic, unqualified right to compensation for that loss).

Under the "careful description" requirement of *Glucksberg*, Petitioners' claimed substantive right is too vague for this Court to decide in the first instance. Petitioners ask the Court not to answer a precisely identified question, but to constitutionalize a new area of law—compensation for criminal defendants in the event their convictions are overturned or vacated. This Court has declined to expand substantive due process rights based on similarly broad claims. *See Chavez*, 538 U.S. at 779–80 (opinion of Souter, J.) (declining to "revolutionize Fifth and Fourteenth Amendment law" by creating a constitutional damages remedy for self-incrimination violations; remanding to allow the lower courts to analyze the substantive due process component of the question); *cf. Glucksberg*, 521 U.S. at 723 (deciding not whether there is a general "right to

die" but whether a prior case should be expanded to include a specific "right to assistance in [committing suicide]").

B. Petitioners cannot demonstrate that their asserted substantive right is "deeply rooted" in history and tradition.

Even if Petitioners' broad formulation of their asserted right were sufficient under the "clearly described" requirement, they nevertheless fail the second prong of the substantive due process analysis. Petitioners' asserted right is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Glucksberg*, 521 U.S. at 721 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). While Petitioners cite a number of criminal cases for the proposition that a defendant is "*always* ... entitled to have his money refunded" if his conviction is reversed, Pet. Br. 28–29 (emphasis added), this is neither an accurate nor a complete description of the historical record.

In England, the common law did, as a general matter, restore felons to the status quo if their convictions were reversed. But at common law, the penalty for a felony conviction was drastic. A felon "forfeited his chattels to the Crown and his lands escheated to his lord." *Austin v. United States*, 509 U.S. 602, 611–12 (1993) (quotation omitted); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *374–82. This harsh "forfeiture of estate" system was accompanied by a sweeping appellate remedy: any error—even the mere imposition of an illegal sentence—made the entire proceeding void *ab initio*, restoring the defendant to his pre-conviction status. 4 WILLIAM

BLACKSTONE, COMMENTARIES *386. If the defendant's forfeited property had been granted to another, the defendant could recover that property directly from the grantee. *Id.* This reflected the narrow authority of a common-law court of error, which had no power to "enter a proper judgment ... or to remand the cause for that purpose." *Ballew v. United States*, 160 U.S. 187, 198 (1895). Instead, "a court of error was confined exclusively to the determination whether error existed, and if it found that it did, its duty was to reverse and discharge the prisoner." *Id.*

From the outset, American jurisdictions rejected the drastic "forfeiture of estate" system, *Austin*, 509 U.S. at 613; *see also* COLO. CONST. art. II § 9 (prohibiting forfeiture of estate), and likewise rejected the all-or-nothing outcome of common-law appellate review, *Ballew*, 160 U.S. at 198. Consequently, when a conviction is invalidated, American courts have not "always" ordered compensation for a defendant's monetary losses. Pet. Br. 28. They have instead adhered to various legal and equitable limitations that apply to such relief.

Sovereign Immunity. To recover monetary amounts paid to the government, a criminal defendant was often required to identify a valid waiver of sovereign immunity and comply with its procedural requirements. In *United States v. Mossew*, for example, a criminal defendant sought compensation for a fine he paid under an indictment that was later quashed. 268 F. at 383. The court denied the claim, explaining that "the United States government in its sovereign capacity cannot be sued, unless by consent of the sovereign," and "until such time as [the defendant]

complie[d] with the requirements essential to enable him to sue the sovereign government he [would be] without redress." *Id.* at 384–85. In other cases, courts likewise held that a criminal defendant could be compensated for monetary amounts paid pursuant to an invalid conviction only in compliance with an applicable waiver of sovereign immunity. *See, e.g.*, *United States v. Gettinger*, 272 U.S. 734, 735 (1927) (holding that defendants could not recover the fines they paid after their convictions were invalidated because they had not identified an applicable waiver of sovereign immunity); *Brown v. Detroit Tr. Co.*, 193 F. 622, 626 (6th Cir. 1912) (reversing a contempt order but declining to compensate the contemnor for the fine he paid because the court was "of opinion that this court has no authority to direct restitution," despite the waiver of immunity contained in the federal Tucker Act); *Herndon v. Superintendent, Va. State Farm*, 351 F. Supp. 1356, 1359–60 (E.D. Va. 1972) (denying a refund of fines paid pursuant to an unconstitutional conviction because it "constitute[d] a suit for recovery of money against the State of Virginia," and the State had not waived sovereign immunity); *cf. Ex parte Morris & Johnson*, 76 U.S. 605, 607 (1869) (in a forfeiture case, holding that "[t]he court has no authority to order the United States to refund"); *State v. Minniecheske*, 590 N.W.2d 17, 20 (Wis. Ct. App. 1998) (holding that "the writs and motions filed do not permit obtaining a money judgment against the State"); *see generally* Annotation, *Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § IV(a) (1923) ("[T]he government, *if it consents to be sued,* may be liable for the refunding of the fine ...." (emphasis added)).

Even *United States v. Lewis*, the case that Petitioners claim "provid[e]s the clearest discussion of the issue," Pet. Br. 33, did not rely on an unqualified right to a refund, but on an explicit waiver of sovereign immunity. 342 F. Supp. 833, 835 (E.D. La. 1972) (explaining that the defendants' requests for compensation "in effect amount [to] suits brought against the government for money judgments and on this basis the court has jurisdiction under the Tucker Act"); *accord Lawson v. United States*, 397 F. Supp. 370, 371–72 (N.D. Ga. 1975) (holding that "the Tucker Act is the basis upon which the government's immunity from suit has been waived in this instance" but denying a refund because the criminal defendant had not complied with the Tucker Act's statute of limitations).

Equitable Considerations. American courts also historically recognized that compensation for amounts paid pursuant to an invalid criminal conviction "is not a matter of strict legal right, but rather one for the exercise of the court's discretion." Annotation, *Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § VI(a) (1923). "[T]he defendant who has paid the fine has no strict legal right upon the reversal of the judgment to an order of restitution even in jurisdictions allowing it, and whether the latter shall be granted is a matter resting in the sound discretion of the Appellate Court." *People v. Bandy*, 239 Ill. App. 273, 278–79 (1925); *see also Carver v. United States*, 111 U.S. 609, 612 (1884) (holding that, even assuming the defendant's conviction was void, he was collaterally estopped from seeking recovery of the fines he paid because he had subsequently agreed that he owed those amounts to the

government).[7] For example, where the defendant could have moved for a stay pending appeal but failed to do so, a court would deny recovery. *Bandy*, 239 Ill. App. at 278; *see also Miami v. Keton*, 115 So. 2d 547, 554 (Fla. 1959) ("There is no showing here that any of the payments were made under protest ...."); *White v. Tifton*, 57 S.E. 1038, 1039 (Ga. 1907) (denying compensation for a criminal fine because the defendant's appeal expired). This often reflected the fact that, despite the invalidity of their convictions, the defendants "committed the offenses for which they were charged." *Callahan v. Sanders*, 339 F. Supp. 814, 818 (M.D. Ala. 1971); *Keton*, 115 So. 2d at 551 ("There is no showing here ... that the offenses provoking the fines were not committed ...."); *City of Hazleton v. Birdie*, 10 Kulp (Pa.) 98 (1900) ("As an order of this kind is one of grace, the court must be largely governed

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[7] Although here the criminal context provides the pertinent historical practice for purposes of the substantive due process inquiry, the historical practice in civil cases was similar. The right to obtain restitution after prevailing on appeal was equitable rather than automatic. *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935) ("Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion; and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip." (quotation omitted)); *see also, e.g.*, *United States v. Morgan*, 307 U.S. 183, 197 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside *and justice requires restitution*." (emphasis added)); RESTATEMENT (FIRST) OF RESTITUTION § 74 (1937) ("A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, *unless restitution would be inequitable*." (emphasis added)).

by what the record shows as to the violation of law by the defendant ....").

Courts also denied recovery from the government or its officials if they no longer possessed the disputed funds and had not acted wrongfully at the time they were collected. Annotation, *Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § IV(a) (1923) ("[A] municipality or the government . . . may be liable for the refunding of the fine, *provided the same has been paid into its treasury*." (emphasis added)); *see also Ex parte Morris & Johnson*, 76 U.S. at 607 (explaining that compensation would have to be recovered from "the distributees within reach of the territorial jurisdiction of the court, except the United States"); *N.J. Soc'y for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 116 (1908) (holding that the parties to whom a fine was paid were required to be "before the court" for a defendant to obtain compensation); *Houtz v. Bd. of Comm'rs*, 70 P. 840, 845 (Wyo. 1902) ("[T]he county is not answerable to the plaintiff for the money so collected unless it is shown to have been paid into the County Treasury."); *cf. United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004) ("[T]he government merely served as an escrow agent pending the final judgment and at the proper time paid the funds over to the victims. It cannot now return money it no longer has."). This undermines Petitioners' claim that the State is obligated to automatically pay to a criminal defendant, from state funds, restitution that has already been disbursed to victims.

* * *

This history demonstrates that the substantive due process doctrine does not encompass Petitioners'

asserted right to an automatic monetary judgment against the State if a criminal defendant's conviction is overturned. In seeking to newly constitutionalize such a right, and "adopt [it] as a constitutional imperative, countrywide," *Patterson v. New York*, 432 U.S. 197, 210 (1977), Petitioners ask the Court to ignore the nuances in historical practice. But historical practice is the only "guide post[ ] for responsible decision-making in this unchartered area." *Collins*, 503 U.S. at 125. "The doctrine of judicial self-restraint," *id.*, counsels against this Court announcing, for the first time, that the Due Process Clause governs the compensation a State must pay to a criminal defendant whose conviction is invalidated.

II. Even assuming Petitioners have a substantive right to a monetary judgment against the State, Colorado's procedural framework for compensating criminal defendants satisfies due process.

In addition to lacking a substantive right to an automatic and unqualified monetary judgment against the State upon the invalidation of a criminal conviction, Petitioners have no procedural right to such a remedy.

A. Because Petitioners' procedural claims are directed at Colorado's criminal process, the inquiry of *Patterson v. New York* and *Medina v. California* governs this case.

This Court has articulated two analytical frameworks for evaluating procedural due process claims. The first is a "general approach" that applies to

issues arising under civil and administrative law. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The second is a narrower inquiry that applies to matters of state criminal procedure. *Medina v. California*, 505 U.S. 437 (1992); *Patterson*, 432 U.S. 197. Petitioners assume, with little analysis, that the general approach articulated in *Mathews* applies here. Pet. Br. 22–23. But the subject of the dispute in this case is a matter of state criminal procedure to which *Patterson* and *Medina* apply.

Mathews is not "an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 168 (2002). Indeed, one year after *Mathews* was announced, this Court held that matters of criminal procedure must be judged under a different test. *Patterson*, 432 U.S. at 201–02. The Court explained that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and the Constitution should not be "lightly construed" to intrude on the States' administration of justice. *Id.* at 202. Thus, "[a State's] decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (internal quotations omitted). In *Medina*, the Court further explained that *Mathews* is inapposite to criminal proceedings because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the

careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443.

A challenged procedure is part of the criminal process, and is therefore subject to the *Patterson–Medina* test, if it relates directly to the defendant's conviction or an underlying criminal proceeding. *See, e.g.*, *Krimstock v. Kelly*, 464 F.3d 246, 254 (2d Cir. 2006) (holding that a "challenge to an underlying criminal proceeding or the procedural rights due the criminal defendant" falls under *Medina*); *Hines v. Miller*, 318 F.3d 157, 161–62 (2d Cir. 2003) (concluding that the district court erred by applying *Mathews* in reviewing procedures for withdrawing a guilty plea). Under this formulation, the criminal process includes the remedies that are available to a defendant who challenges his conviction. For example, in *Herrera v. Collins*, 506 U.S. 390, 407–11 (1993), this Court analyzed whether a particular remedy—a new trial—was required if a defendant sought to invalidate his conviction with new evidence. The Court applied *Medina*, examined the historical record, and determined that the denial of a new trial did not "transgress[ ] a principle of fundamental fairness." *Id.* at 411.

Petitioners raise an analogous claim here. They assert that a particular remedy—an automatic monetary judgment against the State—must be part of the process that attends the challenging and setting aside of a criminal conviction. Pet. Br. 28 (arguing that "[c]riminal cases are no exception" and that defendants are "always" entitled to a refund upon reversal of a

conviction). Their claim thus falls squarely within the scope of the *Medina* rule.[8]

B. Colorado's procedures satisfy *Patterson* and *Medina*.

The *Patterson–Medina* test is similar to the test that governs substantive due process claims. It requires upholding a challenged state procedure unless the procedure offends a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445–46. As discussed above in Section I.B, there was no settled historical right to an automatic, unqualified monetary judgment against the State after a criminal defendant's conviction was overturned. *Patterson* and *Medina* therefore foreclose Petitioners' claim that Colorado is constitutionally required to provide a procedure for obtaining such a judgment. *See Medina*, 505 U.S. at 446 (explaining that a procedural due process claim failed because "no settled tradition" supported it); *Patterson*, 432 U.S. at 210 (rejecting a due process claim that was unsupported by history and explaining

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[8] Petitioners' reliance on the dissenting opinion in *Kaley v. United States*, 134 S. Ct. 1090 (2014), and on *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), is misplaced. Pet. Br. 22–23. Those cases involved forfeiture procedures that were unrelated to a criminal conviction or to the proceedings underlying a criminal conviction. *Kaley*, 134 S. Ct. at 1094 (analyzing whether persons accused, but not convicted, of a crime and "wishing to hire an attorney" could "challenge[ ] a pre-trial restraint on their property"); *Daniel Good*, 510 U.S. at 46 (evaluating the process available in *civil* forfeiture cases). In any event, *Kaley* is non-precedential; the majority expressly declined to decide whether *Mathews* or *Medina* was the appropriate analytical framework. *Kaley*, 134 S. Ct. at 1101.

that the "subtle balancing of society's interests" on matters of criminal procedure should be "left to the legislative branch").[9]

An analysis of the procedural elements of Colorado's Exoneration Act confirms this conclusion. Those procedural elements, "in operation," do not "transgress[ ] any recognized principle of 'fundamental fairness.'" *Medina*, 505 U.S. at 448.

The Wrongful Conviction Requirement. The Act provides compensation to a criminal defendant whose conviction was "wrongful" because the defendant did not participate in the relevant crime. 2013 Colo. Sess. Laws 2412; COLO. REV. STAT. § 13-65-101(1). This requirement is consistent with the equitable nature of a refund proceeding. *Atl. Coast Line R.R.*, 295 U.S. at 310 (noting that "the court will not order [restitution upon the reversal of a judgment] where the process is set aside for a mere slip"); *Birdie*, 10 Kulp (Pa.) at 98 (explaining that restitution upon reversal of a conviction is governed by "what the record shows as to the violation of law by the defendant"). A conviction may be reversed for many reasons that have nothing to do with a defendant's innocence. As Petitioners admit, this is true of "most convictions." Pet. Br. 9. For example, an incorrect suppression ruling may require

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[9] Contemporary practice is "of limited relevance to the due process inquiry." *Medina*, 505 U.S. at 447. Even so, a review of contemporary practice, *infra* Section III.A, demonstrates that there remains no settled view regarding Petitioners' claimed right to an automatic and unqualified monetary judgment against the State. *See Medina*, 505 U.S. at 447 (denying a due process claim where there was "no settled view of where the burden of proof should lie" (emphasis added)).

reversal and may result in a defendant's acquittal or a prosecutor's decision not to seek retrial. But its "bottom-line effect, in many cases, is to suppress the truth." *Davis v. United States*, 564 U.S. 229, 237 (2011). Such errors do not equitably demand a monetary judgment against the State. *See id.* ("[S]ociety must swallow this bitter pill when necessary, but only as a last resort." (quotation omitted)).[10]

The Burden of Proof. Placing the burden on the defendant to establish an equitable entitlement to compensation, COLO. REV. STAT. § 13-65-102(6)(b), likewise does not offend fundamental fairness. *Keton*, 115 So. 2d at 551 (noting that the defendants did not show "that the offenses provoking the fines were not committed"); *see Atl. Coast Line R.R.*, 295 U.S. at 309 ("The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."). It is the criminal defendant who claims that equity requires compensation, and this Court has often held that, even with respect to alleged constitutional errors, "the burden of showing essential

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[10] Here, it is highly unlikely that Petitioners could establish an equitable right to compensation. Nelson's restitution paid for counseling for her children, for whom she is legally responsible under state law. *See, e.g.*, *In re Estate of Reed*, 201 P.3d 1264, 1268 (Colo. App. 2008) (holding that a child's "parents were responsible in the first instance for paying for [a psychologist]'s services"). And Nelson's brother and sister-in-law were convicted of sexual crimes against those same children, crimes which Nelson herself helped facilitate. *See supra*, Statement. Madden allegedly admitted to police that he committed his crime, *Madden*, R. Court File Vol. 1 at 11, and significant evidence supported his conviction, J.A. 74.

unfairness" may be placed on a criminal defendant "who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Buchalter v. New York*, 319 U.S. 427, 431 (1943) (quoting *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 281 (1942)); *see also Harrington v. Richter*, 562 U.S. 86, 104 (2011) (explaining that the burden of invalidating a conviction for ineffective assistance of counsel rests with the "person challenging [the] conviction"); *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) ("Petitioner has been given ample opportunity to prove that he has been denied due process of law.").

The Clear and Convincing Standard. The clear and convincing standard of proof is a permissible means of ensuring that the outcome of a proceeding is equitable. Habeas corpus proceedings, for example, are equitable in nature, *Withrow v. Williams*, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part) ("Concerns for equity ... resonate throughout our habeas jurisprudence."), and the evidentiary standard in federal habeas proceedings is "clear and convincing evidence," *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007). With the passage of time, witnesses and other sources of evidence become less reliable and less available. *See Herrera*, 506 U.S. at 403. This is especially true in cases like this one, involving minor victims who experienced traumatic episodes of sexual assault years ago. Petitioners themselves admit that it would be consistent with due process to require them to satisfy the clear and convincing standard if they sought compensation for wrongful incarceration, Pet. Br. 22, a claim that would present identical equitable concerns. Given those

concerns, application of the clear and convincing standard does not transgress fundamental fairness.

C. Colorado's procedures also satisfy the *Mathews* test.

As it did in *Kaley v. United States*, 134 S. Ct. 1090, 1100–01 (2014), this Court may avoid addressing whether the *Patterson–Medina* test applies here. Petitioners' claim also fails the *Mathews* test.

Under *Mathews*, this Court considers "(1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements." *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011) (quotation omitted). Here, Colorado's procedures do not create a substantial risk of an erroneous deprivation of the defendant's interest in compensation, and any such risk is justified by the State's interest in ensuring that full compensation to criminal defendants is granted consistent with principles of equity.

The Nature of Petitioners' Interest. Petitioners assert that "people whose convictions have been reversed have a property interest in obtaining a refund." Pet. Br. 23. Again, Petitioners do not define the source or nature of this property interest. But the interest can arise from only one of two sources: the substantive due process doctrine or state law. *Gonzales*, 545 U.S. at 755–57 (explaining that, in an earlier case, the Court had found no relevant property

right under the substantive due process doctrine and proceeding to consider "what [property interest] state law provides").

In either case, Petitioners' property interest is not absolute but is rather contingent—it amounts only to the right to bring an equitable claim. *See supra* Section I.B (explaining that the historical right to compensation was contingent and equitable); COLO. REV. STAT. §§ 13-65-101(1), -102(4)(a)(II) (providing that under the Exoneration Act, compensation is available only if a defendant did not participate in the relevant criminal activity and did not commit other wrongful acts such as suborning perjury). And because the property interest here is an interest in a contingent claim, rather than a present entitlement, due process is satisfied so long as an "ordinary judicial process"—such as a civil action for damages—is provided. *Lujan v. G & G Fire Sprinklers*, 532 U.S. 189, 196–97 (2001).

The Risk of Erroneous Deprivation. To minimize the risk that criminal defendants will be inequitably deprived of property or liberty, Colorado provides numerous pre- and post-deprivation procedures.

First, certain felony defendants may, with the assistance of counsel, contest probable cause to support the charges, as Petitioners did here. J.A. 2, 46; *see* COLO. REV. STAT. § 16-5-301; COLO. R. CRIM. P. 5(a)(4), 7(h); *Schwader v. Dist. Court*, 474 P.2d 607, 610 (Colo. 1970). If the defendant does not concede probable cause and the State cannot establish probable cause, the case is dismissed, and the defendant is not required to pay costs or restitution or submit to criminal punishment such as fines or incarceration. *Second*, a defendant is

entitled to a jury trial at which the prosecution must prove guilt beyond a reasonable doubt. *See Griego v. People*, 19 P.3d 1, 8 (Colo. 2001) (discussing the right to a jury trial under the beyond-a-reasonable-doubt standard). If the defendant does not plead guilty and is acquitted at trial, he or she is not required to pay any costs or restitution or submit to criminal punishment such as fines or incarceration. *Third*, with respect to restitution, a convicted defendant is entitled to a hearing where the prosecution must prove by a preponderance of the evidence that the defendant proximately caused injury to the victims. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). If the defendant does not concede the requested restitution and the prosecution is unable to satisfy that burden, restitution is not awarded. *Fourth*, a defendant may request a stay of sentence pending the resolution of an appeal. COLO. REV. STAT. §§ 16-12-103, 18-1.3-702(1)(a); COLO. APP. R. 8.1(a)(3); COLO. R. CRIM. P. 37(f). If payments are stayed and the conviction is reversed, the defendant is not required to make any payments. *Fifth*, a defendant may challenge the validity of his conviction on appeal. If successful on the ground that the conviction is void, the defendant may be entitled to automatic compensation.[11] If successful

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[11] A conviction may be reversed as void because, for example, it was based on a lack of jurisdiction or an unconstitutional statute. *See State v. McDonnell*, 176 P.3d 1236, 1240 (Or. 2007) (citing BLACK'S LAW DICTIONARY 861 (8th ed. 2004) and explaining that "a procedural error results in a voidable judgment, while a jurisdictional error results in a void judgment"). Under Colorado law, it appears that a void conviction would establish a right to a refund of monetary amounts paid pursuant to the conviction. *See Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961); *see also People v.*

on grounds related to actual innocence and either not retried or acquitted, the defendant may seek compensation through the Exoneration Act, which is available if the defendant demonstrates that he or she is equitably entitled to compensation.

These procedures are effective at minimizing the risk of error. In Colorado, over 35,000 felony criminal cases are filed each year.[12] Only a fraction of dispositions in those cases are challenged; in 2014, for example, 37,966 criminal cases were filed in Colorado district courts while only 1,030 direct or post-conviction criminal appeals were filed in the court of appeals.[13] The court of appeals remanded 185 of them, and its instructions to the trial court varied from granting a new trial to correcting a clerical mistake in the mittimus.[14] Of remands that arose from direct appeals,

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Nelson, 362 P.3d 1070, 1078 n.5 (Colo. 2015), Pet. App. 20a n.5 (distinguishing rather than overruling *Toland* because there the court had not provided "an acceptable substitute for trial"). Many cases cited by Petitioners to suggest that compensation must be available any time a conviction is overturned appear to involve void, rather than voidable, convictions. *See In re Stewart*, 571 F.2d 958, 968 (5th Cir. 1978); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973); *Telink, Inc. v. United States*, 24 F.3d 42, 43 (9th Cir. 1994); *United States v. Venneri*, 782 F. Supp. 1091, 1094–95 (D. Md. 1991); *People v. Meyerowitz*, 335 N.E.2d 1, 7 (Ill. 1975).

[12] Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2016, pg. 18, *available at* http://bit.ly/2gAkXTq.

[13] Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2014, pg. 12, *available at* http://bit.ly/2gAkXTq.

[14] A variety of sources were used to arrive at these numbers and the figures that follow. Using 2014 as an example year, we sorted

only ten cases resulted in vacation of all convictions.[15] An additional nineteen cases were remanded for post-conviction proceedings. Of those, only two cases resulted in a dismissal or acquittal after retrial.[16] Thus, in 2014 a total of only twelve cases—less than 0.04% of the total number of criminal cases filed annually and less than 1.2% of criminal cases appealed that year—were ultimately concluded with no criminal charges being sustained.[17]

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through all of the Court of Appeals announcement documents, *available at* http://bit.ly/2hrti91, from fiscal year 2014 to find the cases that the court remanded. We then used Colorado State Court—Data Access program, *available at* http://bit.ly/2hmDW3p, to review the minute orders and final dispositions of the relevant cases.

[15] *See People v. Myers*, 11CR241 (Weld County), 12CA0167 (Colo. Ct. App.); *People v. Valdez*, 10CR34 (Lincoln County), 12CA0005 (Colo. Ct. App.); *People v. Elmquist*, 10CR464 (La Plata County), 11CA2225 (Colo. Ct. App); *People v. Pickering*, 10CR1608 (Weld County), 11CA2043 (Colo. Ct. App.); *People v. Dalton*, 10CR1792 (Larimer County), 11CA2128 (Colo. Ct. App.); *People v. Colbert*, 09CR2934 (Arapahoe County), 11CA0013 (Colo. Ct. App.); *People v. French*, 09CR3540 (El Paso County), 10CA1949 (Colo. Ct. App.); *People v. Priewe*, 09CR3525 (El Paso County), 11CA0351 (Colo. Ct. App.); *People v. Dixon*, 08CR35 (City and County of Denver), 10CA1841 (Colo. Ct. App.); *People v. Storm*, 08CR2562 (Arapahoe County), 09CA2782 (Colo. Ct. App.). Proceedings remain ongoing in four cases.

[16] *People v. Nava-Hernandez*, 10CR210 (Arapahoe County), 13CA0571 (Colo. Ct. App.); *People v. Gerards*, 03CR1797 (Larimer County), 12CA0587 (Colo. Ct. App). Proceedings remain ongoing in four cases, and in another the court cannot locate the defendant.

[17] In fiscal year 2014, the Colorado Supreme Court remanded around twenty criminal cases either to the trial court or to the

As these numbers demonstrate, Colorado's procedures minimize the risk that a criminal defendant will be inequitably deprived of property. Petitioners' proposed automatic monetary judgment against the State—which does not depend on considerations of equity—would not increase the likelihood of an equitable outcome.[18]

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court of appeals. None resulted in the complete vacation of the defendants' convictions on remand.

[18] Petitioners raise various arguments regarding the conditions that are necessary for relief under the Exoneration Act. Pet. Br. 9–10. Petitioners lack standing to assert the due process rights of other defendants who may not be subject to the Act. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid ...."). In any event, Petitioners' objections are meritless. While the Exoneration Act does not grant relief in misdemeanor cases, Pet. Br. 9, an alternative procedure is often available: the Colorado Supreme Court has held that county courts must grant stays of sentences pending misdemeanor appeals. *People v. Steen*, 318 P.3d 487, 489 (Colo. 2014). And although Petitioners disparage the fee-shifting provision of the Act as inadequate to assure a remedy in cases like theirs, Pet. Br. 10, fee-shifting provisions "enable [parties] to [seek relief] even where the amount of damages at stake would not otherwise make it feasible." *Riverside v. Rivera*, 477 U.S. 561, 577 (1986). Petitioners' assertion that Colorado courts will be unable to apply the Act's fee-shifting provision is specious; state courts have significant experience applying fee-shifting provisions in small-dollar cases. *See Mercantile Adjustment Bureau, LLC v. Flood*, 278 P.3d 348, 357 n.8 (Colo. 2012) (explaining that "[t]he 'value' of victory in a fee-shifting case is not always gauged solely in monetary terms"); *id.* at 354 ("Fee-shifting provisions such as this were designed to encourage the bar to enforce these actions, which generally involve only small sums of money.").

Countervailing Interests. Petitioners assert that "the government's interest is non-existent." Pet. Br. 23. But Colorado has an interest in ensuring that any compensation awarded after a conviction is overturned comports with equitable principles. Indeed, Colorado compensates exonerated defendants for not only their payment of fines, costs, and restitution, but also any deprivation of freedom. COLO. REV. STAT. § 13-65-103(2)(e). Petitioners concede that the procedures provided by the Exoneration Act are appropriate for awarding damages related to the deprivation of freedom. Pet. Br. 22. The same government interest that applies to compensation for incarceration applies to Petitioners' claimed entitlement to a refund. *See* Pet. App. 22a.

III. Petitioners' miscellaneous arguments are flawed.

Petitioners raise various arguments to support their claimed right to automatic compensation in the event a criminal conviction is overturned. Each argument is flawed, and none changes the outcome of the above substantive and procedural due process analysis.

A. Petitioners' characterization of contemporary practice is inaccurate.

Petitioners describe Colorado as "an extreme outlier" and assert that there is a current "national consensus" that supports their claimed right to automatic compensation upon invalidation of a criminal conviction. Pet. Br. 34–35. This is inaccurate.

First, Petitioners cite various state statutes, which they claim "mandate" refunds for criminal defendants "as a matter of course when their convictions are

reversed." Pet. Br. 30. In fact, none of those statutes provide refunds for restitution; two apply only to fines; two apply only to specific surcharges and assessments; and one does not provide for refunds at all. CAL. PENAL CODE § 1262 (providing for return of fines and penalty assessments without providing for return of fees, costs, or restitution); DEL. CODE. ANN. tit. 11, § 4103(a)–(d) (providing for refunds of fines, as well as costs in certain cases, without providing for refunds of restitution); MISS. CODE ANN. § 99-19-73(12) (providing for refunds of state "assessments" without providing for refunds of fines or restitution); N.Y. PENAL LAW § 60.35(4) (providing for a refund of specific surcharges and fees without providing for refunds of fines or restitution); TEX. CODE CRIM. PROC. ANN. art. 103.008(a) (allowing courts to "correct any error in the costs" without providing for a refund).

Second, Petitioners attempt to brush aside as irrelevant jurisdictions that deny refunds in various circumstances. Pet. Br. 34 & n.13. But those jurisdictions demonstrate that Petitioners are incorrect in claiming that, everywhere but Colorado, refunds are granted automatically. *See* Pet. Br. 34 n.13 (citing five jurisdictions that deny refunds); *see also United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004) (holding that when the government has distributed restitution to victims, "the defendant has no right to recover any such sums"); *Brantley v. State*, 769 N.E.2d 676, 679–80 (Ind. Ct. App. 2002) (holding that no refund was required when monetary charges assessed against a defendant paid for a community corrections program she attended as a condition of probation); *Barnett v. State*, 695 P.2d 991, 991 (Or. Ct. App. 1985) ("[W]e are aware of [no authority] which authorizes a court in a

post-conviction proceeding . . . to require the state to repay to plaintiff the restitution that he paid for the benefit of a private party."); *Minniecheske*, 590 N.W.2d at 20 ("We therefore conclude that the writs and motions filed do not permit obtaining a money judgment against the State.").

Current practice is "of limited relevance to the due process inquiry," and if there is currently "no settled view" regarding a claimed procedural right, due process does not mandate one particular approach. *Medina*, 505 U.S. at 447. Here, there is no "settled view" regarding the right to an automatic and unqualified refund upon reversal of a criminal conviction, despite Petitioners' arguments to the contrary. Petitioners misrepresent current practice when they claim that "every other State in the Union" provides the type of relief they seek. Pet. Br. 34 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 427 (1994)).

B. The right to a refund for taxpayers who must "pay first and litigate later" has no application here.

Seeking to offer some precedent for their constitutional claim, Petitioners cite a number of cases that "involved unlawfully collected taxes." Pet. Br. 24. Those cases, Petitioners argue, "require[ ] states to provide a meaningful remedy for the recovery of money" and "appl[y] equally to monetary payments collected by a state pursuant to a conviction that is subsequently reversed." *Id.*

Petitioners cite no authority establishing that these tax refund cases are relevant to the criminal setting. *Id.* at 24–25. Indeed, the settings are significantly

different, and their differences dictate the appropriate outcome in each. In the cases Petitioners cite, the government had collected the taxes before the taxpayer was given a realistic opportunity to dispute liability. The taxpayers were required to "pay first, litigate later." *Reich v. Collins*, 513 U.S. 106, 112 (1994); *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (explaining that the State had "relegate[d] [the taxpayer] to a postpayment refund action"); *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) (same); *Ward v. Bd. Of Cnty. Comm'rs*, 253 U.S. 17, 24 (1920) (same); *Atchison, Topeka, & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285–87 (1912) (same).

In the criminal setting, by contrast, States like Colorado provide numerous procedures specially tailored to the unique concerns of defendants facing a deprivation of liberty. *See supra* Section II.C. Many of those procedures are mandated by the Bill of Rights. *Medina*, 505 U.S. at 443. Importing tax-specific procedures into the criminal setting would invite precisely the type of "undue interference" with the criminal process that this Court has held would be improper. *Id.*

C. Colorado bears the burden to prove criminal liability beyond a reasonable doubt.

Due process requires a State to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Colorado honors that requirement. *Medina v. People*, 163 P.3d 1136, 1140 (Colo. 2007). Petitioners, however, assert that unless a State provides a criminal defendant with automatic compensation for monetary amounts paid pursuant to

a conviction later held invalid, the State has unconstitutionally shifted the beyond-a-reasonable-doubt standard to the defendant. Pet. Br. 21–22. Petitioners cite no authority for that proposition, and Colorado has found none.[19]

This burden-shifting argument is simply another way of disputing that a State may condition compensation for criminal defendants on considerations of equity. As explained in Section I.B, *supra*, courts have long held that claims for compensation attendant to an overturned conviction may be treated as equitable. That Petitioners disagree with this history does not mean that Colorado has unconstitutionally shifted the burden of proof. Petitioners concede that Colorado may require criminal defendants to bear the burden of establishing a right to compensation for incarceration. Pet. Br. 22, 25. They do not explain why the rule must be different when a defendant seeks compensation for the less significant deprivation of monetary assessments paid pursuant to a conviction that is later overturned.

D. Colorado makes meaningful distinctions among the monetary assessments a defendant must pay.

Petitioners group all assessments paid by criminal defendants into a single category of "monetary

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[19] The presumption of innocence applies only at criminal trials, not at hearings to establish compensation for defendants whose convictions have been overturned. *See Bell v. Wolfish*, 441 U.S. 520, 534 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal *trials*...." (emphasis added)).

payments," arguing that "it makes no difference what name Colorado uses for the money it collects." Pet. Br. 35. In Colorado, not all monetary assessments are punitive; many either compensate victims for losses or defray the cost of maintaining a criminal justice system. *See, e.g.*, *People v. Noel*, 134 P.3d 484, 487 (Colo. App. 2005) (holding that probation supervision fees are not refundable when a conviction is reversed because the purpose of probation is primarily rehabilitative); *People v. Howell*, 64 P.3d 894, 899 (Colo. App. 2002) (explaining that costs are imposed to reimburse the State for the actual expenses incurred in prosecuting a defendant and are not punitive). As Petitioners acknowledge, some States deny a refund based on the function that the relevant monetary assessment serves. Pet. Br. 34 n.13 (citing *State v. Parker*, 872 P.2d 1041 (Utah. Ct. App. 1994)). And many state refund statutes explicitly distinguish among types of assessments, declining to provide refunds for different categories of them. *See supra* Section III.A.

Significantly, those statutes often decline to provide refunds for restitution. *Id.* In Colorado, a restitution order—which requires separate proof by a preponderance of the evidence that the defendant proximately caused the victim's injuries—creates a civil judgment in favor of the injured victim, and payments are made to the victim, not the State. COLO. REV. STAT. § 18-1.3-603(3)(a), (4)(a); *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). Given the unique nature of restitution, the weakest aspect of Petitioners' claim in this case is the assertion that they are constitutionally entitled to compensation from the State for restitution they paid to third-party victims. *See, e.g.*, *Hayes*, 385

F.3d at 1230 (holding that "if the government retains the monies until the conviction becomes final and then distributes it to identifiable victims, as it did here, the defendant has no right to recover any such sums from the government"); *Barnett*, 695 P.2d at 991 (declining to "require the state to repay to plaintiff the restitution that he paid for the benefit of a private party").[20]

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

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[20] The procedures that may constitutionally govern civil forfeiture demonstrate that not all financial consequences of criminal conduct must be treated identically under the Constitution. Like civil forfeiture, restitution is based on the same conduct as a potential criminal conviction but does not depend on a valid conviction. *Compare United States v. Ursery*, 518 U.S. 267, 270–92 (1996) (holding that civil forfeiture after criminal acquittal does not violate double jeopardy) *and Austin v. United States*, 509 U.S. 602, 616 (1993) (holding that criminal conviction is not a prerequisite to civil forfeiture) *with Pagan*, 165 P.3d at 731 (holding that imposing restitution based on conduct for which a defendant was acquitted does not violate double jeopardy or collateral estoppel).

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RECORD AND BRIEF

No. 15-1256

FILED
DEC 22 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

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Right to Recover Back Fine or Penalty Paid in Criminal Proceeding, 26 A.L.R. 1523 (1923) 6

REPLY BRIEF FOR PETITIONERS

The money at issue in this case is the property of Shannon Nelson and Louis Madden. Once their convictions were reversed, Colorado's right to the money evaporated. Colorado does not claim to have any property interest in the money or even any interest in preventing Nelson and Madden from getting it back.

By placing an impossibly high procedural hurdle between petitioners and their property, for no apparent reason, Colorado is literally depriving them of property without due process.

I. Colorado is depriving petitioners of their property without due process.

Colorado spends much of its brief (Resp. Br. 13-23) responding to a substantive due process argument we do not make. Our argument sounds in *procedural* due process. Where a state is holding property that belongs to one of its citizens, the state must provide a procedure that is adequate to return the property.

A. The money at issue belongs to Nelson and Madden, not to Colorado.

Colorado errs in arguing (Resp. Br. 13) that our "asserted substantive right is founded in the Due Process Clause." In fact, it is founded in state property law. There is no doubt that the money at issue belongs to Nelson and Madden, not to Colorado. When the judgments in Colorado's favor were reversed, there was no longer any legal basis for the payments. The money became the property of

Nelson and Madden. Governments that obtain money pursuant to judgments of conviction do not get to keep the money when those judgments are reversed, because the money is no longer their property.

This proposition is almost too obvious to need stating. It is as true in Colorado as it is in every other state. *See, e.g.*, *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1990) (discussing "the principle 'long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby.'") (quoting *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919)); *Denver & S.L.R. Co. v. Chicago, B. & Q.R. Co.*, 185 P. 817, 820 (Colo. 1919) ("The law is unquestioned that a party procuring a reversal of an erroneous judgment is entitled to restitution.").[1]

The Colorado Supreme Court thus decided this case on the assumption that Nelson and Madden had established a property interest in having their money refunded. Rather than dwelling on that question, the court proceeded straight to the

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[1] The state wisely does not claim that the contours of property rights in Colorado are defined by the procedure provided in the Exoneration Act. Such a claim would be foreclosed by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property").

question of whether the Exoneration Act provides sufficient process for defendants to recover the money. Pet. App. 22a. The dissenting judge below likewise assumed that the money at issue is the "defendant's money," Pet. App. 26a, not the state's.

It would be almost unthinkable for a state to claim ownership of money paid pursuant to convictions that have been reversed. That would be tantamount to charging defendants for the privilege of being tried unlawfully. Fortunately, Colorado has not made any such claim. Colorado does not dispute that the money at issue belongs to Nelson and Madden.

B. The Exoneration Act is not an adequate procedure for refunding money to appellants upon the reversal of their convictions.

The Exoneration Act is not an adequate procedure for returning money to prevailing appellants upon the reversal of a conviction. The Act was not intended to serve this purpose. Pet. Br. 2-8. The procedure provided by the Act is of no use to the vast majority of prevailing appellants. Pet. Br. 9-11. The Exoneration Act virtually ensures that the state will keep money that is undisputedly the property of Nelson and Madden.[2]

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[2] The Exoneration Act may be an even higher barrier than we described in our opening brief. At Pet. Br. 6-7, we construed §§ 13-65-102(2)(a)(I) and (II) to require, paradoxically, that the ground for reversal be unrelated to the defendant's actual innocence. We have since realized that these provisions may be even more paradoxical than that. The phrase "other than" may

Because the reversal of a judgment means the appellee no longer has any property interest in money paid pursuant to that judgment, the normal practice has been for governments to refund payments pursuant to convictions when the convictions are reversed. Pet. Br. 26-30; NACDL Br. 4-20. Indeed, it would be shocking if normal practice were otherwise. Colorado claims (Resp. Br. 18-22) to have found several examples to the contrary. But Colorado misunderstands the cases it cites. In these cases, where courts refused to refund payments upon the reversal of a conviction, it was for case-specific reasons that are not present here and that do not contradict the general practice of providing refunds.

In two of Colorado's cases, courts decided merely that habeas corpus is the wrong vehicle for seeking the recovery of payments, not that such payments are unrecoverable. *State v. Minniecheske*, 590 N.W.2d 17, 19 (Wis. Ct. App. 1998) ("A petition for a writ of habeas corpus is designed to challenge the taking of a person's liberty, not to obtain a money judgment."); *id.* at 21 ("[W]e agree with Minniecheske that there must be a remedy that can enable him to successfully recover the money the State improperly seized."); *Herndon v. Superintendent*, 351 F. Supp. 1356, 1358 (E.D. Va. 1972) ("The issue remains, therefore, whether habeas corpus relief can be applied for the return of fines levied and collected by virtue of an unlawful conviction. The Court con-

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modify both "legal insufficiency of evidence" *and* "legal error unrelated to the petitioner's actual innocence." If so, these provisions bar petitions from defendants whose convictions were reversed for *any* reason, whether insufficiency of evidence or an error unrelated to innocence.

cludes that it cannot."); *id.* at 1360 ("Were this a state appellate court, the result might be different."). In another of Colorado's cases, a court determined merely that a specific fine could not be recovered under a specific federal code section. *United States v. Mossew*, 268 F. 383, 384 (N.D.N.Y. 1920) ("this section is not applicable to the remissions of a fine in the case at bar").

In one of Colorado's cases, this Court found that a refund claim had been expressly waived by the defendants' plea of nolo contendere. *United States v. Gettinger*, 272 U.S. 734, 735 (1927). In another, the statute of limitations for recovering payments had expired. *Lawson v. United States*, 397 F. Supp. 370, 372 (N.D. Ga. 1975). In another, a Court of Appeals expressly avoided deciding the issue, on the ground that refunding a fine was a matter for the District Court. *Brown v. Detroit Trust Co.*, 193 F. 622, 626 (6th Cir. 1912) ("Without deciding that on reversal of the contempt order restitution of the fine paid could be enforced under the Tucker act ... we are of opinion that *this* court has no authority to direct restitution") (emphasis added). And in one, this Court, after reversing the District Court's judgment, actually ordered the District Court "to cause restitution to be made to the appellants of whatever they have been compelled to pay under that decree." *Ex parte Morris*, 76 U.S. 605, 605-06 (1869) (internal quotation marks omitted).

In the remaining cases cited by Colorado, fines were not refunded because the defendants had paid the fines voluntarily as settlements, to avoid other penalties such as incarceration or fines in a greater

amount. *People v. Bandy*, 239 Ill. App. 273, 277-78 (Ill. App. Ct. 1925) ("The test by which the right of recovery is determined seems to be whether the payment can be said to have been a voluntary or an involuntary one. ... [W]here a fine has been paid under the advice of counsel in order to settle the case or to avoid penalties for other offenses or the trouble and expense of an appeal, the payment is said to be a voluntary one."); *Carver v. United States*, 111 U.S. 609, 612 (1884) (fine not refunded because defendant "voluntarily conceded that there was justly due from him to the government a larger sum than he had paid"); *City of Miami v. Keton*, 115 So. 2d 547, 551 (Fla. 1959) ("payment is voluntary and cannot be recovered"); *White v. City of Tifton*, 57 S.E. 1038, 1039 (Ga. Ct. App. 1907) (payment was "voluntary in the legal sense of that word"); *Callahan v. Sanders*, 339 F. Supp. 814, 818 (M.D. Ala. 1971) ("It has long been settled that when one pays a fine voluntarily under a mistake of law, that fine cannot be recovered."); *City of Hazleton v. Birdie*, 10 Kulp 98, 99 (Pa. C. 1900) ("if the payments were voluntarily made by the defendant then he would not be entitled to restitution"). *See generally Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § II.b.1 (1923) ("money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance") (internal quotation marks omitted); *cf. id.* § I (by contrast, where the payment was "an involuntary one, the fine may generally be recovered").

Needless to say, none of the unusual circumstances present in Colorado's grab-bag of cases is present in our case. Shannon Nelson and Louis Madden properly sought refunds from the courts in which they were convicted, not through some inappropriate procedure such as habeas corpus. They did not waive the right to seek refunds or wait too long. They certainly did not make payments to the state voluntarily; the payments were compelled by the now-reversed judgments of conviction. Colorado is simply incorrect in denying the existence of a traditional practice of refunding money upon the reversal of a judgment. Colorado itself followed that traditional practice until this case. *See Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing a conviction, ordering that "the parties be placed in *status quo* by refund to the defendant of the sums paid as fine and costs").

Colorado errs further in suggesting (Resp. Br. 18-20) that sovereign immunity bars Nelson and Madden from recovering the money they paid pursuant to their now-reversed convictions. Nelson and Madden are not suing the state. It was the state that filed suits against Nelson and Madden, when it charged them with crimes. Now that the judgments in those cases have been reversed, the money that belongs to Nelson and Madden should be returned to them. Sovereign immunity has never been thought to interfere with such refunds, which governments have routinely been providing to successful appellants for centuries.

To be sure, as Colorado observes (Resp. Br. 21 n.7), courts have discretion to refuse a *complete* re-

fund upon the reversal of a judgment, where a complete refund would be inequitable. The Court has noted: "Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 309 (1935). The Court continued: "But the rule, even though general in its application, is not without exceptions," because restitution is "a remedy which is equitable in origin and function." *Id. See also United States v. Morgan*, 307 U.S. 183, 197 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution."). The Court provided an example in *Atlantic Coast Line* of a circumstance in which a complete refund would not be equitable. Where an insurance company overpaid a claimant because the claimant exaggerated the amount of the loss, the insurance company could recover only the amount of the overpayment, not the complete amount it had paid to the claimant. *Atlantic Coast Line*, 295 U.S. at 310.

In our case, however, there are no equitable considerations that would justify a less-than-full refund. Colorado does not even argue that equitable considerations require the state to keep any of the money that belongs to Shannon Nelson and Louis Madden. Such an argument would be frivolous. Colorado took their money pursuant to judgments that have now been reversed. This is petitioners' money, not Colorado's.

II. Colorado's scheme is contrary to due process under any standard.

Colorado argues (Resp. Br. 23-26) that its scheme should be evaluated under the standard of *Medina v. California*, 505 U.S. 437 (1992), rather than that of *Mathews v. Eldridge*, 424 U.S. 319 (1976). This argument is incorrect. The Exoneration Act is a civil remedy. *Mathews* is the appropriate standard for evaluating whether civil processes comport with due process. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). The *Medina* standard applies only to procedural rules that "are part of the criminal process." *Medina*, 505 U.S. at 443. The Exoneration Act is not part of the criminal process. *Mathews* thus provides the appropriate standard.

But it makes no difference which standard the Court uses. Colorado's scheme is an egregious denial of due process under any standard.

A. Colorado's scheme fails the *Medina* standard.

Under *Medina*, a procedure violates due process where it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Colorado's scheme offends such a principle. Stated narrowly, the principle is that upon the reversal of a judgment, the appellant is entitled to a refund of money she paid pursuant to that judgment. Stated broadly, the principle is that a state may not deliberately keep property that belongs to one of its

citizens. "Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Medina*, 505 U.S. at 446. In both versions, this principle has been followed for centuries. It is as deeply rooted and fundamental as any principle of justice could be.

In arguing otherwise, Colorado repeatedly (e.g., Resp. Br. 26) mischaracterizes the relief petitioners seek as a "monetary judgment against the State." Petitioners are not seeking any kind of judgment against the state. Petitioners already have judgments in their favor, in criminal cases brought against them by the state. Petitioners won. Yet the state is holding on to their money as if they lost.

Rather than assessing the effect of its scheme as a whole, Colorado divides the scheme into parts (Resp. Br. 27-29), and argues that each individual part satisfies the *Medina* standard. But Colorado is mistaken even here.

First, Colorado errs in suggesting (Resp. Br. 27-28) that actual innocence is an appropriate prerequisite for the recovery of money paid pursuant to a conviction that has been reversed. Colorado collects this money only from people against whom the state obtains a judgment of conviction. Without a judgment of conviction, the state has no basis for keeping its citizens' money.

Second, Colorado errs in contending (Resp. Br. 28-29) that due process permits the burden of proof to be placed on petitioners, on the theory that defendants seeking the reversal of convictions must prove that errors occurred at trial. But we are long past that stage of the proceedings. Petitioners' convictions

have already been reversed. Colorado has taken money from Nelson and Madden in their criminal cases, money the state takes only pursuant to convictions, but Nelson and Madden stand convicted of no crime. In effect, Colorado is requiring Nelson and Madden to prove their innocence in order to avoid criminal penalties. But the Due Process Clause places the burden of proof on the state. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979).

In a footnote at the end of its brief (Resp. Br. 42 n.20), Colorado analogizes its scheme to civil forfeiture, but the analogy is a very poor one. Unlike civil forfeitures, which states often collect without obtaining a criminal conviction, the money at issue in our case is collected by the state *only* pursuant to a criminal conviction. When a conviction is reversed, the state loses any basis for keeping the money. Unlike forfeited assets, which must be the proceeds or instrumentalities of crime, the money at issue in our case was neither. Moreover, to the extent there are any due process limits on civil forfeitures unconnected to criminal convictions, those limits are derived primarily from traditional practices associated with civil forfeiture, which has its own unique history. *Bennis v. Michigan*, 516 U.S. 442, 453 (1996); *id.* at 454 (Thomas, J., concurring). Likewise, the due process limits relevant to the reversal of judgments are derived primarily from traditional practices associated with the reversal of judgments, a topic with a history of its own. That history is very clear: For centuries, a prevailing appellant has been entitled to get her money back. A decision in our case thus need not have any implications for civil forfeitures.

Third, Colorado errs in arguing (Resp. Br. 29-30), that due process permits the state to require defendants to prove their actual innocence by clear and convincing evidence, on the theory that the clear and convincing standard is used in other areas of law such as habeas corpus. But no American jurisdiction has ever used the standard in *this* area, until this case. Indeed, so far as we are aware, Colorado is the first jurisdiction to require successful appellants to prove their innocence by *any* standard to get their money back when their convictions are reversed.

B. Colorado's scheme fails the *Mathews* standard.

Colorado's scheme also fails the *Mathews v. Eldridge* test. The state's contrary view (Resp. Br. 30-36) rests on a misunderstanding of the test's three factors.

The first *Mathews* factor is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. In our case, that interest is the property right that Nelson and Madden have in their own money. Colorado errs (Resp. Br. 31) in describing this property right as "the right to bring an equitable claim." It is more than that. It is actual ownership of the money that Colorado is refusing to refund.

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id.* Colorado's scheme virtually guarantees that defendants like Nelson and Madden will never get their money

back. The risk of an erroneous deprivation approaches 100%. The value of substitute procedural safeguards—most obviously a return to the conventional practice of simply refunding the money—would be enormous, because it would reduce the risk of erroneous deprivation to zero.

Rather than discussing this risk, Colorado discusses (Resp. Br. 31-35) the risk that an innocent defendant will be convicted at trial. But that risk has no relevance to our case. We are not arguing that Colorado should change its trial procedures.

The third *Mathews* factor is "the Government's interest." *Id.* In our case, Colorado has no interest. Colorado does not claim that the money at issue is the state's property. Colorado does not even claim that it has any interest in preventing Nelson and Madden from getting their money back. The only interest Colorado asserts (Resp. Br. 36) is a general interest in comporting "with equitable principles." But Colorado does not explain why equitable principles require the state to keep money that belongs to Nelson and Madden, or why equitable principles require the state to construct a high procedural barrier separating Nelson and Madden from their own property.

III. Colorado's remaining arguments are incorrect.

Colorado devotes the last few pages of its brief to several short arguments, all of which are incorrect.

First, although Colorado denies (Resp. Br. 36) that it is an outlier, Colorado fails to identify any other jurisdiction that requires defendants to prove

their innocence to obtain a refund of monetary payments when a conviction is reversed. To our knowledge, no other jurisdiction has *ever* imposed such a requirement. Rather, as we showed (Pet. Br. 30-35) in our opening brief, and as amicus NACDL shows (NACDL Br. 15-19) in even more detail, the norm today, as in the past, is to refund monetary payments without requiring defendants to prove their innocence—indeed, without requiring defendants to prove anything at all, other than the fact that their convictions were reversed.

Instead, Colorado lists (Resp. Br. 37-38) cases in which refunds have been denied because: (1) the person seeking the refund failed to serve the proper parties, *see* cases cited at Pet. Br. 34 n.13; (2) the person seeking the refund obtained a benefit in exchange for the money, *see* cases cited at Pet. Br. 34 n.13 and *Brantley v. State*, 769 N.E.2d 676, 679-80 (Ind. Ct. App. 2002); or (3) the defendant erroneously used habeas corpus as a vehicle for seeking a refund, *see Minniecheske*, 590 N.W.2d at 19-21. These cases show merely that states may impose reasonable procedural requirements for defendants to seek refunds when their convictions are reversed, and that the value of any benefit the defendant received for his money may be deducted from the refund. These cases certainly do not show that any state employs a scheme anything like Colorado's.

Second, Colorado erroneously denies (Resp. Br. 38-39) the relevance of the long line of cases in which the Court has held that due process requires states to provide a clear and certain remedy for the recovery of money the state has wrongfully withheld. If

taxpayers are entitled to a meaningful procedure for securing refunds of sums collected pursuant to a tax subsequently held unlawful, there is no reason why criminal defendants should not also be entitled to a meaningful procedure for securing refunds of sums collected pursuant to a conviction subsequently held unlawful. It would be very strange if the due process protections for criminal defendants were weaker than those for taxpayers.

Finally, Colorado contends (Resp. Br. 40-42) that money it has collected from Nelson and Madden and then distributed to victims as restitution may not be refunded, because restitution "payments are made to the victim, not the State." Resp. Br. 41. This argument is wrong for two reasons. First, in the absence of a conviction, Nelson and Madden have no obligation to compensate victims. Second, money is fungible. The state cannot avoid refunding the money it has taken from Nelson and Madden, on the ground that it has already given the money to someone else. If avoiding a debt were that easy, few debts would ever be repaid.

When a judgment is reversed, a person who has paid money pursuant to that judgment is entitled to get the money back. The money is her property. That has been the law of the land for centuries. In adopting a rule to the contrary, Colorado has deprived Shannon Nelson and Louis Madden of their property without due process.

CONCLUSION

The judgments of the Colorado Supreme Court should be reversed.

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RECORD AND BRIEFS

FILED
NOV 18 2016
OFFICE OF THE CLERK

No. 15-1256

In The
Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ Of Certiorari To
The Colorado Supreme Court

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

conferences, and produces the annual *Cato Supreme Court Review*.

Both IJ and Cato are deeply troubled by the suggestion – implicit in Colorado's challenged legal scheme – that the right to property can be made contingent on affirmative proof of innocence. The right to property is not limited to individuals who can undertake the daunting and expensive task of marshalling proof of innocence; ***all*** Americans enjoy the right to be secure in their property, at least until the government obtains a valid criminal conviction in a court of law. A contrary rule would render the right to property effectively meaningless for some of the most vulnerable members of society, and it would potentially subject all Americans to an unjust and unconstitutional obligation to prove their innocence. The right to property is not so limited.

SUMMARY OF ARGUMENT

The presumption of innocence has been repeatedly recognized and reaffirmed by this Court as a deeply-held and foundational principle underlying our justice system, long predating the adoption of the Constitution and firmly embedded within the "due process of law" protected by the Fifth and Fourteenth Amendments. This Court has recognized that the presumption of innocence "is stated as unquestioned in textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts

of the several states."[2] Simply put, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[3]

This principle – that all individuals are presumed innocent until validly convicted in a court of law – is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed."[4] The origins of the presumption go well beyond our own Anglo-American legal system, stretching back to Roman antiquity and beyond to the Old Testament. *Infra* pp. 6-7. The presumption was central to the English common law, including the writings of Sir William Blackstone. *Infra* p. 8. And disregard for the presumption of innocence was one of the motivating factors behind the Declaration of Independence at the time of this nation's birth. *Infra* pp. 9-10. Moreover, the presumption of innocence has never been limited to criminal cases but extends through all the law. *Infra* pp. 11-14. Unsurprisingly, given that pedigree, the presumption of innocence has been repeatedly reaffirmed by this Court. *Infra* pp. 15-17.

Applying the presumption of innocence, this should be an easy case. All individuals have the right to be secure in their property unless and until the government obtains a valid conviction in a court of law.

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[2] *Coffin v. United States*, 156 U.S. 432, 454 (1895).

[3] *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916) (Holmes, J.), *cited with approval by Patterson v. New York*, 432 U.S. 197, 209 (1977).

[4] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

Here, however, Colorado has flipped that presumption on its head, instead requiring property owners who are not subject to any legally-valid conviction to come forward with "clear and convincing evidence" that they are "actually innocent" of a crime.[5] By thus "flip[ping] the presumption of innocence,"[6] Colorado's scheme for seeking a refund of criminal penalties contravenes principles that lie at the core of our justice system and violates the guarantee of due process secured by the Fifth and Fourteenth Amendments.

ARGUMENT

This brief proceeds in two parts. First, the brief traces the pedigree of the presumption of innocence, establishing that the presumption is deeply rooted in our nation's history and tradition. Second, the brief applies this foundational principle to the instant case, explaining that Colorado's scheme for obtaining a refund of criminal penalties is inconsistent with the basic precept that all persons are presumed innocent unless and until they are subject to a valid judgment of conviction. So framed, this is a simple case. Colorado's scheme is inconsistent with the most basic requirements of due process.

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[5] Colo. Rev. Stat. §§ 13-65-101(1)(a),13-65-102(1)(a).

[6] *People v. Nelson*, 362 P.3d 1070, 1081 (Colo. 2015) (Hood, J., dissenting).

I. The Presumption of Innocence Is Deeply Rooted in Our Nation's History and Tradition, Such That It Is Implicit in the Concept of Ordered Liberty.

The presumption of innocence is such a foundational principle – so suffusing every aspect of our legal system – that it is perhaps at risk of being taken for granted. This brief thus begins by tracing the origins of that principle, its extension beyond the requirement that criminal charges be proved beyond a reasonable doubt, and its repeated application by the decisions of this Court.

A. The Presumption of Innocence Has Deep Historical Roots.

The presumption of innocence has been called "a general principle of our political morality,"[7] "a guardian angel,"[8] the "cornerstone of Anglo-Saxon justice,"[9] "a touchstone of American criminal jurisprudence,"[10] "the golden thread that runs throughout the criminal

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[7] William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 338 (1995) (quoting William Twining, *Rethinking Evidence: Exploratory Essays* 208 (1990)).

[8] Laufer, *supra*, at 338 (quoting James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 553 (1898)).

[9] Laufer, *supra*, at 338 (quoting Henry J. Abraham, *The Judicial Process* 96 (1993)).

[10] Laufer, *supra*, at 338 (quoting *People v. Layhew*, 548 N.E.2d 25, 27 (Ill. App. Ct. 1989)).

law,"[11] and the "focal point of any concept of due process."[12] This basic principle traces its roots far past our nation's Founding, through English common law to writings from antiquity and even the Old Testament.

Several writers have observed the Biblical foundations of the presumption of innocence.[13] In the Book of Genesis, after Adam and Eve ate the forbidden fruit, God did not summarily punish them but instead summoned them to hear their pleas:

> "Have you eaten of the tree of which I commanded you not to eat?" The man said, "The woman, whom you gave to be with me, she gave me fruit of the tree, and I ate." Then the LORD God said to the woman, "What is this that you have done?" The woman said, "The serpent deceived me, and I ate."[14]

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[11] Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L. J. 457, 457 (1988-1989) (citations omitted) (quoting Rupert Cross, *The Golden Thread of the English Criminal Law: The Burden of Proof* 2 (1976)).

[12] Sundby, *supra*, at 457 (quoting Sandra Hertzberg & Carmela Zammuto, *The Protection of Human Rights in the Criminal Process Under International Instruments and National Constitutions* 16 (1981)).

[13] *See Coffin v. United States*, 156 U.S. 432, 454 (1895) (citing Simon Greenleaf, III, *A Treatise on the Law of Evidence* § 29, at 31 n.1 (Edmund H. Bennett & Chauncey Smith, eds., 1853) (tracing the presumption to Deuteronomy); *see also* Alexander Volokh, *N. Guilty Men*, 146 U. Pa. L. Rev. 173, 173, 178 (1997) (identifying biblical passages loosely related to the presumption of innocence).

[14] *Genesis* 3:11-13.

Thus, even an omniscient God did not presume Adam and Eve to be guilty, but only inflicted punishment after obtaining proof through confessions (and presumably rejecting Adam's defense of entrapment and Eve's defense of fraud). The presumption of innocence found even more concrete expression in the Book of Deuteronomy, which states that "[o]ne witness is not enough to convict anyone accused of any crime" and instructs judges to "make a thorough investigation" before inflicting punishment.[15]

The presumption of innocence can definitively be traced back to antiquity and the ancient Roman maxim, *de quolibet homine presumitur quod sit bonus homo donec probetur in contrarium*, meaning, "each person may be presumed to be a good man, until the contrary is proved."[16] A related maxim embodying the presumption of innocence stated, *ei incumbit probatio, qui dicit, non qui negat*, meaning "the burden of proving a fact rests on the party who asserts it, not on the party who denies it."[17] The Emperor Trajan, meanwhile, wrote that a person should not "be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned."[18]

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[15] *Deuteronomy* 19:15-20; *see also Numbers* 35:30.

[16] James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 Yale L. J. 185, 190 (1897).

[17] Laufer, *supra*, at 332 n.14 (citing George P. Fletcher, *Rethinking Criminal Law* 520 (1978)).

[18] Volokh, *supra*, at 178 (quoting Dig. 48.19.5 (Ulpian, De Officio Proconsulis 7)).

The presumption of innocence was once again picked up in the writings of Enlightenment philosophers. Voltaire, for instance, wrote of "that generous Maxim, 'that "tis much more Prudence to acquit two Persons, tho" actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent.'"[19]

From there, the presumption of innocence took firm root in English common law.[20] Echoing Voltaire, as well as Emperor Trajan, Sir William Blackstone declared that "the law holds, that it is better that ten guilty persons escape than that one person suffer."[21] Blackstone's Commentaries on the Laws of England "not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers."[22] Influenced by both Voltaire and Blackstone, Benjamin Franklin, "our founding grandfather,"[23] wrote, "That it is better 100 guilty Persons should escape than that

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[19] *See* Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 Tenn. L. Rev. 759, 761 n.6 (1995) (quoting *Respectfully Quoted* 183 (Suzy Platt ed., 1992) (quotation from a 1974 translation of the 1749 version of Zadig)).

[20] In-depth treatments of these developments can be found in Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507 (1975); Laufer, *supra*; Thayer, *supra*; and Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441 (1978).

[21] 4 William Blackstone, *Commentaries*, *358 (1765).

[22] *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997).

[23] *See* Dudley R. Herschbach, *Our Founding Grandfather*, Harv. Mag., Sept. 2003.

one innocent Person should suffer, is a Maxim that has been long and generally approved."[24]

In fact, one of the motivations leading up to the Declaration of Independence from Great Britain was the Crown's disregard for this principle of innocent until proven guilty.[25] The American colonists had many objections to the infamous Sugar Act of 1764 and its companion, the Stamp Act of 1765. In addition to the core complaint of taxation without representation,[26] the colonists strongly objected to the enforcement provisions of the two statutes. Whereas in England actions asserting violations of similar laws were tried before a jury, cases alleging violations of the Sugar and Stamp Acts were to be tried in newly-created American vice-admiralty courts where there were no jury trials.[27]

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[24] Letter from Benjamin Franklin to Benjamin Vaughan (March 14, 1785) *in* 9 *The Writings of Benjamin Franklin, 1783-1788*, at 293 (Albert H. Smyth ed., 1906).

[25] *See* Declarations and Resolves of the First Continental Congress (Oct. 14, 1774), *available at* http://avalon.law.yale.edu/18th_century/resolves.asp.

[26] *See* Samuel Adams, Report on the Sugar Act (May 1764), *in* Theodore Draper, *A Struggle for Power: The American Revolution* 219 (1996) ("If Taxes are laid upon us in any shape without our having a legal Representation where they are laid, are we not reduced from the Character of free Subjects to the miserable State of tributary Slaves?").

[27] *See* Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part B)*, 27 J. Mar. L. & Comm. 323, 332 (1996) (noting this was "a constant source of irritation to the American colonists"). For example, John Adams argued that the use of the vice-admiralty courts to try trade cases placed an unfair burden on Americans:

"The most onerous provisions"[28] of the Acts required merchants whose vessels were seized for alleged customs violations to bear the burden of proving that they were not guilty.[29] Thus, one grievance leading to the American Revolution was the Crown's disregard for the presumption of innocence – a feature shared with Colorado's scheme here.

> The Parliament . . . guarding the People of the Realm, and securing to them the Benefit of a Tryal by the Law of the Land, and . . . depriving all Americans of that Privilege – What shall we say to this Distinction? Is there not in this.., a Brand of Infamy, of Degradation and Disgrace fixed upon every American? Is he not degraded below the Rank of an Englishman?'

Id. at 336 (quoting John Adams, Admiralty Notebook, in microfilms of the Papers of John Adams, pt. III, reel 184).

[28] Harrington, *supra*, at 333.

[29] For example, Article XLV of the Sugar Act provided:

> [I]f any ship or goods shall be seized . . . and any dispute shall arise whether the customs and duties for such goods have been paid . . . then, and in such cases, ***the proof thereof shall lie upon the owner or claimer of such ship or goods, and not upon the officer who shall seize or stop the same***; any law, custom, or usage, to the contrary notwithstanding.

The Sugar Act (Apr. 5, 1764) *in Prologue to the Revolution: Sources and Documents on the Stamp Act Crisis 1764-1766*, at 8 (Edmund S. Morgan ed., 2012).

B. The Presumption of Innocence Is Integral to the Concept of Justice and Due Process of Law.

The presumption of innocence extends well beyond the requirement that the government must prove guilt beyond a reasonable doubt in a criminal trial and is, in fact, an axiomatic principle that defines the concept of justice and due process throughout our entire legal system. "[N]either liberty nor justice would exist if [it was] sacrified."[30]

The presumption of innocence is more than a simple evidentiary presumption, and instead reflects a long-standing societal judgment about the degree of legal process that is required to strip an individual of liberty and property. The presumption is a "shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden."[31] It "takes possession of this fact, innocence, as not now needing evidence, as already established *prima facie*."[32] In other words, the presumption does

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[30] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

[31] *Taylor v. Kentucky*, 436 U.S., 478, 483 n.12 (1978); *see also id.* (explaining that "the so-called 'presumption' is not evidence – not even an inference drawn from a fact in evidence – but instead is a way of describing the prosecution's duty"); *Commonwealth v. Webster*, 59 Mass. 295 (1850), *abrogated on other grounds by Commonwealth v. Russell*, 470 Mass. 464 (2015) ("All the presumptions of law ***independent of evidence*** are in favor of innocence, and every person is presumed to be innocent until he is proved guilty.") (emphasis added).

[32] Thayer, *supra*, at 199; *see also id.* (explaining that the presumption of innocence means that, even if a person is "under

not depend on a judgment that an individual is ***in fact*** more likely innocent than guilty; indeed, as a factual matter, it might be more reasonable to assume that anyone who has been arrested and indicted is more likely guilty than not.[33] Instead, the presumption stands for the basic proposition that a person can be deprived of rights to liberty or property only following a valid conviction by a court of law.

Respect for this presumption of innocence is foundational to the very concept of justice. The presumption emerged in the English common law as part of a profound transformation in the nature and function of legal proceedings, and it can be contrasted to other, medieval approaches to the administration of justice:

> An accused did not have to demonstrate innocence by hands unscarred from hot coals, irons, or stones. An accused did not have to bring together twelve peers in a wager of law to swear that his or her oath of innocence was clean and trustworthy. God could no longer

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grave suspicion," "he is not to suffer in your minds from these suspicions or this necessity of holding him confined and trying him").

[33] *See* Zechariah Chafee, *The Progress of the Law*, 35 Harv. L. Rev. 302, 314 (1922) ("There is no probability that a man indicted by a grand jury is usually innocent"); Thayer, *supra*, at 199 ("[I]f the jury were not thus called off from the field of natural inference, if they were allowed to range there wherever mere reason and human experience would carry them, the whole purpose of the presumption of innocence would be balked. For of the men who are actually brought up for trial, probably the large majority are guilty."); *id.* at 188 (the presumption in favor of the defendant is a "maxim of policy and practical sense; it is not founded on any notion the defendants generally are [factually] free from blame.").

> reveal the innocent from the murderer, thief, and robber. ***Proof of factual innocence was replaced by proof of legal guilt or its absence, legal innocence***. Legal standards and burdens of proof acknowledged what ancient fact finders and jurists could not: Definitive proof of factual innocence was too much of a burden for mortals to bear.[34]

In other words, the presumption of innocence is intrinsic to the very idea of a rational and orderly justice system. The presumption marks the divide between a world where individuals can be subjected to arbitrary and irrational deprivations of their liberty and property – forced to win back their rights through an affirmative showing of innocence – and a world where rights can be infringed only following a valid legal judgment of guilt.

This "general rule of policy and sense" – that all persons shall be assumed, in the absence of evidence, to be free from blame – runs "through all the law."[35] It often has been stated in the context of criminal proceedings,[36] but it is by no means limited to that

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[34] Laufer, *supra*, at 331-32 (emphasis added).

[35] Thayer, *supra*, at 189.

[36] *See* Thayer, at 196; George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L. J. 880 (1967-1968) (arguing that the presumption of innocence and the requirement of proof "beyond a reasonable doubt" are historically and philosophically distinct).

context.[37] To the contrary, its first appearance in the American colonial courts, an early (1657) decision of the General Court of Massachusetts, emphasized its broader applicability:

> Whereas, ***in all civil cases*** depending in suit, the plaintiff affirmeth that the defendant hath done him wrong and accordingly presents his case for judgment and satisfaction, it behoveth both court and jury to see that the affirmation be proved by sufficient evidence, else the case must be found for the defendant; and ***so it is also in a criminal case***, for in the eyes of the law every man is honest and innocent unless it be proved legally to the contrary.[38]

In other words, the presumption of innocence applies broadly beyond criminal cases and is integral to due process of law.

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[37] *See, e.g., Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding, in civil tax-enforcement proceeding, that "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt").

[38] Thayer, *supra*, at 189 (quoting 16 Records of Massachusetts, III., 434). *See generally* P. Thomas, *Revolution in America: Britain and the Colonies, 1763-1776* at 67 (1992); David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, 16 Wm. & Mary Q. 459 (1959); C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 126-42, 154-58 (1960).

C. This Court Has Consistently Recognized That the Presumption of Innocence Is Constitutionally Required.

Unsurprisingly, in light of the pedigree and importance of the presumption of innocence, this Court has long recognized the presumption of innocence as a touchstone of the American justice system. As early as 1827, the Court acknowledged that "the general rule of our jurisprudence is, that the party accused need not establish his innocence, but it is for the government itself to prove his guilt, before it is entitled to a verdict of conviction."[39]

In *Coffin v. United States*, the Court explicitly recognized the presumption of innocence as a fundamental

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[39] *U.S. v. Gooding*, 12 Wheat. 460, 471 (1827) (Story, J.). Other decisions suggest that the presumption of innocence has always been part of the American justice system. *See, e.g., Hopt v. Utah*, 120 U.S. 430, 439 (1887) (approving jury instruction adopted by lower court stating that "the law presumes the defendant innocent until proven guilty beyond a reasonable doubt"); *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877) ("[I]n criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor."); *see also Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) ("[F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence"; rather, it is "the duty of the Government to establish his guilt," a notion "basic in our law and rightly one of the boasts of a free society [and] a requirement and a safeguard of due process of law") (Frankfurter, J., dissenting), *cited with approval by In re Winship*, 397 U.S. 358, 362 (1970).

principle of criminal law. The question presented was whether the trial court had violated a defendant's rights by not instructing the jury on the presumption of innocence. Before embarking on a detailed historical analysis of its origins, the Court characterized the presumption of innocence as "axiomatic and elementary," affirming that "its enforcement lies at the foundation of the administration of our criminal law."[40]

Since then, the Court has repeatedly held that the presumption of innocence is constitutionally required. For example, in *In re Winship*, the Court held that juveniles, like adults, were entitled to proof beyond a reasonable doubt when charged with a violation of criminal law.[41] The Court reiterated that the presumption of innocence, as a "bedrock" principle, was constitutionally required.[42] In *Estelle v. Williams*, the Court declared that, "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[43] And in *Taylor v. Kentucky*, the Court concluded that the presumption of innocence "is an

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[40] 156 U.S. 432, 453 (1895).

[41] 397 U.S. 358 (1970).

[42] 397 U.S. 358, 363 (1970) (observing that the reasonable-doubt standard "provides concrete substance for the presumption of innocence").

[43] 425 U.S. 501, 503 (1976) (Burger, C.J.).

element of Fourteenth Amendment due process, an essential of a civilized system of criminal procedure."[44]

The Court has also adhered to this same principle in analyzing the constitutionality of legislation. In *Tot v. United States*, the Court rejected the idea that "the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt."[45] And in *McFarland v. American Sugar Refining Co.*, the Court stated that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[46]

II. By Flipping the Presumption of Innocence, Colorado Has Denied Petitioners Due Process.

This case can and should be resolved through a straightforward application of the presumption of innocence. Although neither Petitioner stands convicted of a crime, each has been forced to pay criminal penalties. In order to seek return of this money, Colorado requires that they prove their innocence, effectively turning the presumption of innocence on its head. By flipping the burden to prove innocence, Colorado has violated Petitioners' due-process rights.

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[44] 436 U.S. 478, 486 n.13 (1978).

[45] 319 U.S. 463, 469 (1943).

[46] 241 U.S. 79, 86 (1916) (Holmes, J.), *cited with approval by Patterson v. New York*, 432 U.S. 197, 209 (1977).

It is undisputed that, while Petitioners were charged with crimes, they were never validly convicted.[47] They should, therefore, stand before the tribunal as all citizens of Colorado would stand: innocent in the eyes of the law, as *prima facie* "good, honest, and free from blame."[48] Instead, Colorado forces them to prove that they are "actually innocent."[49] Colorado's burden shifting amounts to an assumption that individuals, whose convictions have been overturned and thus no longer have any legal effect, are *prima facie* guilty of the crimes with which they were charged. And to add insult to this constitutional injury, they have to prove that they are actually innocent of the charge "by clear and convincing evidence."[50]

Colorado cannot escape this conclusion by attempting to shoehorn these proceedings into the framework of the State's Exoneration Act, an Act which does not even apply.[51] The Exoneration Act requires proof of actual innocence to obtain compensation for wrongful incarceration.[52] Here, by contrast, Petitioners seek return of property that was taken by the government pursuant to a now-invalid criminal conviction. In other words, Petitioners only ask for the return of what is theirs. Because Petitioners have not been validly convicted, the government has no legal

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[47] *See* Pet'r's Br. 13-14.

[48] Thayer, *supra*, at 189.

[49] Colo. Rev. Stat. §§ 13-65-101(1)(a), 13-65-102(1)(a).

[50] *Id.* § 13-65-101(1)(a).

[51] *See* Pet'r's Br. 4-8.

[52] *See* Colo. Rev. Stat. §§ 13-65-101(1)(a), 13-65-102(1)(a).

basis to continue to hold that property – much less to force Petitioners to affirmatively prove their own innocence to get that property back.

In our legal system, individuals cannot be deprived of property based on accusations, without putting the government to its proof. That basic principle – the presumption of innocence – runs throughout the legal system and is central to the very idea of ordered liberty. By instead placing the burden on Petitioners to affirmatively prove their innocence in order to vindicate their property rights, Colorado has inverted the basic structure of our legal system and turned this foundational precept on its head.

CONCLUSION

For the reasons set forth above, *amici* urge the Court to hold that Colorado has violated due process by requiring Petitioners to prove their innocence and thus to reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON *and* LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

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even in the seventeenth century." Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America, in Drugs, Crime & Social Policy* 109 (Thomas Mieczkowski ed., 1991). Following this trend, forfeiture and corruption of blood were rejected by the Framers as penalties for treason and by the First Congress as penalties for all federal crimes. U.S. Const. Art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Act of April 20, 1790, ch. 9, § 24, 1 Stat. 117 (1790) ("[N]o conviction or judgment * * * shall work corruption of blood or any forfeiture of estate."), repealed as to offenses occurring after Nov. 1, 1987 by Pub. L. No. 98-473, 98 Stat. 1987, 2031 (1984).

For these reasons—and perhaps also because the principle requiring restoration of property upon reversal of a conviction was so well accepted as not to arise in court proceedings—there are few cases from the late eighteenth and nineteenth centuries addressing the issue. But see *Stromburg* v. *Earick*, 45 Ky. 578, 582 (1846) (ordering a recalcitrant Justice of the Peace to refund a fine paid when the Justice had lacked jurisdiction over the case).

But the recognition of the principle by Blackstone and other influential treatise-writers would have been familiar and persuasive to early American courts:

- "[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee." 2 Hawkins, *A Treatise of Pleas of the Crown* 655 (John Curwood, ed., 8th ed. 1824).

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and with its affiliates represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the just, proper, and efficient administration of justice. It frequently appears as an *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case. The question whether due process permits States to impose procedural burdens on defendants seeking the return of financial exactions after their convictions have been invalidated—when the exactions were based entirely on the now-invalid criminal convictions—is an issue of great importance to individuals improperly convicted of criminal offenses.[1]

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this *amicus* brief have been filed with the Clerk.

SUMMARY OF ARGUMENT

What procedures may a State require an exonerated criminal defendant to satisfy before the State is obligated to return monetary exactions collected on the authority of the since-invalidated conviction?

Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to 13-65-103, as interpreted by the Colorado Supreme Court in this case, requires a defendant to:

- institute a separate civil proceeding; and
- prove his or her factual innocence by clear and convincing evidence.

Pet. App. 1a-16a. These extraordinary requirements violate the Due Process Clause of the Fourteenth Amendment.

This Court has frequently recognized the importance of history to the due process inquiry, and in this case the history is dispositive. The right to restoration of monetary exactions attendant to a subsequently-invalidated criminal conviction dates back more than six hundred years.

From the Middle Ages until the American Revolution, courts consistently required the Crown to return a criminal defendant's property if the criminal judgment against him was reversed. Blackstone and other treatise writers recognized that this norm remained in force in the eighteenth and nineteenth centuries.

Most States have incorporated this principle into common law or statutory standards governing the return of funds obtained on the authority of a criminal conviction that is later set aside. Indeed, this principle applies in civil contexts as well—as reflected in decisions of this Court requiring the return of funds

obtained as a result of a later-overturned civil judgment.

While States have great leeway in our federal system to establish their own procedures, they may not do so in a way that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)). The Due Process Clause requires Colorado to permit the return of funds exacted on the basis of a subsequently-invalidated conviction without burdensome procedural requirements.

Moreover, the holding below produces a highly anomalous result. In the tax context, for example, individuals are entitled to clear and certain refunds when the tax has been proven unlawful. Criminal defendants seeking relief from exactions based on an invalid conviction are entitled to at least the same due process protection as taxpayers burdened by an unlawful tax.

The Colorado statute also differentiates between similarly situated criminal defendants in two impermissible ways. *First*, the statute's evidentiary burden applies only to defendants who were incarcerated. It does not provide relief for individuals who were sentenced to fines without incarceration. Distinguishing classes of criminal defendants in this way violates this Court's holding in *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966), which prevents states from differentiating between similarly situated defendants based on incarceration. *Second*, the Act distinguishes between defendants whose jury verdicts have been overridden for insufficiency of the evidence based on whether the trial judge or the appellate judge made the

ruling. Neither distinction is reasonable, and both violate Colorado defendants' rights.

For all of these reasons, this Court should reverse the judgment of the Colorado Supreme Court and hold that a State may not impose anything more than minimal procedures on the refund of exactions based on a subsequently-invalidated conviction.

ARGUMENT

COLORADO'S EXTRAORDINARY REQUIREMENTS FOR THE RETURN OF MONETARY EXACTIONS VIOLATE DUE PROCESS.

Colorado's procedure for the recovery of funds exacted on the basis of a subsequently-invalidated conviction is unconstitutional, as demonstrated by history, a comparison with the due process requirements for refunds of unconstitutionally-exacted taxes, and the irrational distinctions drawn by Colorado's law.

A. The Colorado statute is inconsistent with the common-law practice of restoring exactions imposed upon conviction when the conviction is later invalidated.

Grounded in both British and colonial history, the Fourteenth Amendment's due process guarantee preserves legal rights that "[t]hose who had been driven from the mother country by oppression and persecution brought with them, as their inheritance." *Hurtado* v. *California*, 110 U.S. 516, 539 (1884).

History therefore plays an important role in determining the contours of due process. Indeed, the Court has recognized that an important question in assessing whether a criminal law procedure violates due process is whether "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505

U.S. at 445 (quoting *Patterson*, 432 U.S. at 202). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446; see also *Weiss* v. *United States*, 510 U.S. 163, 199 (1994) (Scalia, J., concurring) (describing the inquiry into history as "utterly conclusive").

Across centuries of early British, colonial, and American history, courts have recognized that when the underlying conviction is invalidated, formerly convicted individuals must be restored to the status quo ante with respect to any monetary exactions imposed on the basis of the since-invalidated conviction. Traditionally, that occurred without additional process and regardless of the reasons for the conviction's invalidity.

The decision below departs from this longstanding principle. Rather than returning to petitioners the money exacted on the basis of their convictions, the Colorado Supreme Court left petitioners with no recourse other than that provided by the Colorado Exoneration Act. That measure requires a defendant who has been imprisoned to institute separate proceedings and prove his or her actual innocence in order to regain the exacted funds. Those proceedings are onerous and violate due process.

1. *The principle that financial exactions are returned upon invalidation of a conviction was recognized in medieval and early common law.*

During the Middle Ages, the primary punishment for major offenses—treasons and felonies—was death. Defendants were typically executed soon after sentence was imposed and therefore rarely lived to see their convictions reversed. But a criminal defendant also faced the financial penalties of "attainder," typically

including "forfeiture" and "corruption of blood." In general, the monarch took the defendant's personal property, his feudal lord took any lands, and his heirs could not trace any inheritance through him. 4 William Blackstone, *Commentaries* *373-*379. Because these sanctions inflicted financial punishments on the defendants' heirs, courts came to allow heirs to bring writs of error. Joseph Chitty, *A Practical Treatise on the Criminal Law* 747 (1816).

Writs of error were also awarded to reverse a different type of criminal judgment—outlawry. Like a default judgment, a judgment of outlawry was entered when the sheriff, obeying a writ of exigent, called out the name of the accused from the courthouse steps on a specified number of occasions, and the defendant failed to answer the summons. See generally 2 Matthew Hale, *Historia Placitorum Coronae* 198-209 (1736). Like a convict, the outlaw was subject to forfeiture and corruption of blood—but unlike the convict, he frequently lived to challenge the judgment against him. Joseph Chitty, *A Practical Treatise on the Criminal Law* 744 (1816) ("The greatest number of cases in which judgment has been thus reversed are those of outlawry.") Indeed, because an outlaw had not yet presented a defense, and because "reversal of [outlawry] only causes an inquiry into the substantial merits of the case [*i.e.*, a trial], the courts [we]re always inclined to reverse it," even for "trifling objections." *Id.* at 752.

If a defendant's judgment (whether one of conviction or outlawry) was reversed on a writ of error, courts required the sovereign to return any monetary exactions imposed as a consequence of the reversed judgment. Minimal, if any, additional process was required to secure the return of funds or land. As

Blackstone explained, "when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, *and the party stands as if he had never been at all accused*; restored in his credit, his capacity, his blood, and his estates." 4 William Blackstone, *Commentaries* *386 (emphasis added). Sir Henry Yelverton, a justice in the Court of Common Pleas, agreed: "So if a termor for years is outlawed, he shall be restored to the term, on reversal of the outlawry, though it has been sold by the king." Theron Metcalf, *The Reports of Sir Henry Yelverton* 180-180a n.2 (1820).

These principles were reflected in early common law decisions. For example, in a 1407 King's Bench case, the Crown had imposed criminal penalties upon the defendant without following the required procedures. The Escheator had found that the defendant had committed treason, and the Crown took his property. But because the Escheator had proceeded "by inquest of office without indictment" and the defendant had been denied his right to indictment by a grand jury, the Escheator's finding of a criminal violation was invalidated. YB 8 Hen. 4, fol. 21b, Pasch., pl. 3 (K.B. 1407), translated at perma.cc/B2N2-R8EB [hereinafter *1407 Case*]. The court ordered the Crown to return the defendant's possessions: "Until indictment for treason and attaint by course of law, the accused traitor forfeited nothing." *Ibid.*

Another early case demonstrates that return of property followed upon reversal of a criminal judgment: "Plaintiff executors brought Error to reverse an outlawry pronounced on their testator. The outlawry was reversed at their suit. Plaintiff executors were restored their testator's goods." YB 11 Henry 4, fol. 65b, Pasch., pl. 22 (Eng. 1410), translated at perma.cc/-

249C-7N33 [hereinafter *1410 Case*]. The Court of Queen's Bench gave the rationale for this rule two centuries later: Monetary penalties had to be returned because a reversal makes "it is as if no outlawry had been." *Ogdell's Case* (1592) 78 Eng. Rep. 526, 526; 34 Cro. Eliz. 270, 271 (Q.B.); see also *Eyre* v. *Woodfine* (1592) 78 Eng. Rep. 533, 533; 34 Cro. Eliz. 278, 278-279 (Q.B.) (returning outlaw's property after reversed judgment).

Thus, when a defendant or his heirs won a reversal of a criminal judgment, the return of his property required no additional process. Following the reversal of a judgment of conviction or outlawry, "the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseisor" with no more. 4 William Blackstone, *Commentaries* *386; accord Joseph Chitty, *A Practical Treatise on the Criminal Law* 756 (1816).[2]

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[2] Process was required in one rare set of circumstances: when the crime was not high treason and the defendant owned lands. In such a case, because the lands had been forfeited to the defendant's feudal lord rather than to the Crown, the lord was entitled to notice and an opportunity to be heard. The required procedure—*scire facias*—was for the annulment of the conveyance records. Joseph Chitty, *A Practical Treatise on the Criminal Law* 755 (1816). It is not apparent on what ground, if any, a lord responding to a writ of *scire facias* could have successfully objected and retained the defendant's land. See *Arthur's Case* (1696) 91 Eng. Rep. 425; 2 Salk. 495 (K.B.) (an outlaw having produced writs of error reversing the judgments of outlawry, the court held that "[i]f there be lands, there must be a scire facias against the lords, mediate and immediate, to shew [sic] cause why [the criminal defendant] should not have restitution."); accord 2 William Hawkins, *A Treatise of the Pleas of the Crown* 654 (John Curwood ed., 8th ed. 1824). As Blackstone recognized, this right to the writ of *scire facias* stemmed from the feudal relationship,

Importantly, this common law rule providing for automatic return of property applied even if the grounds for invalidating the criminal judgment were unrelated to guilt or innocence. In *1407 Case*, for example, the conviction was reversed because proper procedures had not been followed; the reviewing court made no inquiry into the defendant's actual guilt or innocence. But the ruling recognized that a monetary sanction imposed on the basis of conviction could not stand when the judgment was invalidated. And in *1410 Case*, the defendant's outlawry was reversed without consideration of the merits of the underlying charges.

Indeed, reversals of criminal judgments in this era frequently rested on facts unrelated to guilt or innocence. Convictions for breaching the King's peace would be reversed if the indictment specified the wrong King (for example, because of an intervening royal death). Judgments of outlawry were invalid if a sheriff used the phrase "at my county court" instead of "at my county court of Middlesex." And when a sentence of execution for high treason stated that the defendant's entrails were to be taken from his body and burned, but failed to specify that they were to be burned "in his sight," "he being alive," the conviction was to be reversed. 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 752-753 (1st Amer. ed. 1832).

No matter the grounds for reversal, "[t]he effect of the reversal of the attainder [was] to restore the party to all the capacities which he had lost, and to all the

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which did not follow the colonies' early settlers as an element of American common law. 4 William Blackstone, *Commentaries* *379 ("[T]he land would naturally have descended to the heir, * * * did not it's feodal [sic] quality intercept such descent, and give it by way of escheat to the lord.").

honours, fortunes and estates which he had forfeited." *Id.* at 755; accord 4 William Blackstone, *Commentaries* *386.

Finally, courts consistently held that defendants were entitled to the return of their property, even if (as was often the case) the Crown in the interim had given or sold the defendant's property to an innocent third party. In *Eyre* v. *Woodfine*, *supra*, for example, a tenant had been outlawed and, upon his outlawry, his tenancy was forfeit to the Crown. The Queen sold his tenancy to an apparently unrelated third party. But the defendant's outlawry was subsequently reversed. The Court of Queen's Bench held that the tenant would be restored to his tenancy.

One justice expressed concern that, although leaving the former outlaw with nothing would be unfair, the bona fide purchaser also had an interest worth protecting. Despite this justice's concerns, the court ruled for the former outlaw:

> [T]he termor shall have again his term, and not the money for which it was sold; and in whosesoever hands the lands came, and by whatsoever consideration, the party shall be restored; for the outlawry being reversed, it is as if there were no record, and the Queen's interest was but conditional, viz. it is good if the outlawry be good; and therefore the term being sold, it is tied with the condition into whomsoever hands it cometh, that if the outlawry be reversed, the term is reduced to the owner.

78 Eng. Rep. at 533. The court held that the purchaser had bought the tenancy subject to the implicit condition that he return it if the Queen's title was defective. *Ibid.*

Eyre was not an outlier. In *Ognell's Case, supra*, a tenant who had been outlawed assigned his lease to the plaintiff. The plaintiff-assignee was put out of possession by one J.S., apparently because the Queen sold the lease to J.S. after the outlawry. The outlawry was reversed, and the plaintiff-assignee sued for the profits J.S. derived from the land from the time the plaintiff was assigned the lease until the time the outlawry was reversed. The defendant objected "that during that time the Queen had the interest, and the assignee had no right." 78 Eng. Rep. 526, Cro. Eliz. 270, 270-271. But the plaintiff-assignee won the case, "for by the reversal it is as if no outlawry had been; and there is no record of it." *Ibid.*

Treatises recognized this longstanding principle that a former outlaw or former convict had a categorical right to possession upon reversal of judgment. Indeed, this right was viewed as so fundamental that the defendant did not owe the new owner any sort of process. Hawkins wrote: "[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 462 (1806).

2. Eighteenth- and nineteenth-century courts continued to return the defendant's property upon invalidation of his conviction.

Financial exactions tied to criminal convictions were both fewer and smaller in early America. The colonists chafed at, and the colonies and early national government abolished, many forms of financial penalties. "[C]riminal forfeiture and corruption of blood were rarely used as penalties in the American colonies,

even in the seventeenth century." Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America, in Drugs, Crime & Social Policy* 109 (Thomas Mieczkowski ed., 1991). Following this trend, forfeiture and corruption of blood were rejected by the Framers as penalties for treason and by the First Congress as penalties for all federal crimes. U.S. Const. Art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Act of April 20, 1790, ch. 9, § 24, 1 Stat. 117 (1790) ("[N]o conviction or judgment * * * shall work corruption of blood or any forfeiture of estate."), repealed as to offenses occurring after Nov. 1, 1987 by Pub. L. No. 98-473, 98 Stat. 1987, 2031 (1984).

For these reasons—and perhaps also because the principle requiring restoration of property upon reversal of a conviction was so well accepted as not to arise in court proceedings—there are few cases from the late eighteenth and nineteenth centuries addressing the issue. But see *Stromburg* v. *Earick*, 45 Ky. 578, 582 (1846) (ordering a recalcitrant Justice of the Peace to refund a fine paid when the Justice had lacked jurisdiction over the case).

But the recognition of the principle by Blackstone and other influential treatise-writers would have been familiar and persuasive to early American courts:

- "[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee." 2 Hawkins, *A Treatise of Pleas of the Crown* 655 (John Curwood, ed., 8th ed. 1824).

- "The effect of the reversal of the attainder is to restore the party to all the capacities which he had lost, and to all the honours, fortunes and estates which he had forfeited." Jospeh Chitty, *A Practical Treatise on the Criminal Law* 756 (1816).

Indeed, the broad recognition of this principle during the nineteenth century is demonstrated by its application in civil cases. That had been true under early English law. Metcalf, *supra*, at 180-180a & n.2; *Eyre* v. *Woodfine*, Cro. Eliz. 278 (Q.B. 1592) (noting that the norm applied in civil cases, though civil defendants were entitled only to money rather than in-kind restoration of their property). And it was true in nineteenth-century America as well. As this Court explained in 1832, "On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost." *Bank of the United States* v. *Bank of Wash.*, 31 U.S. 8, 15 (1832).

This power to order restoration to the status quo ante in civil cases was not statutory, nor did it require a separate lawsuit. Rather, the power to require repayment after a reversed judgment is "inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.* v. *St. Louis Sw. Railway Co.*, 249 U.S. 134, 146 (1919).

Indeed, this Court's opinions did not distinguish between civil and criminal judgments at all:

> [T]he power is inherent in every court, while the subject of controversy is in its custody, and the parties are before it, to undo what it had no

> authority to do originally, and in which it, therefore, acted erroneously, and to restore, so far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal. The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution.

Nw. Fuel Co. v. *Brock*, 139 U.S. 216, 219 (1891).

This principal is beyond cavil. See *United States* v. *Morgan*, 307 U.S. 183, 197 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution."); *Buzz Barton & Associates, Inc.* v. *Giannone*, 483 N.E.2d 1271, 1275 (Ill. 1985) ("It is well established that [o]n reversal of a judgment under which one of the parties has received benefits, he is under an obligation to make restitution * * *."); *Miga* v. *Jensen*, 299 S.W.3d 98, 101 (Tex. 2009) ("Restitution after reversal has long been the rule in Texas and elsewhere."); *Restatement (Third) of Restitution and Unjust Enrichment* § 18 (Am. Law Inst. 2011) ("A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment.").

3. Most States today provide for automatic return of monetary exactions upon reversal of the conviction permitting imposition of the exactions.

Consistent with these centuries of treatise-writing and case law, at least 27 States today expressly recognize—in common law or statutory provisions—the principle that monetary exactions imposed upon the basis of a criminal conviction must be returned when the conviction is invalidated.

In at least 14 States, this norm is embodied in the common law. For example, the Florida District Court of Appeals has held:

> [T]he respondent trial judge has jurisdiction in this cause * * * to entertain the petitioner's motion herein for the return of a $500 fine, a $350 restitution payment as a probationary condition, and a $90 probation cost payment as a probationary condition (all previously imposed as a penalty by the trial court upon petitioner's conviction for malicious destruction of personal property) as part of its inherent power to correct the effects of its own wrongdoing and restore the petitioner to the status quo ante, following a reversal on appeal of said conviction and remand for a new trial * * *.

Cooper v. *Gordon*, 389 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980). See also *Ex parte McCurley*, 412 So. 2d 1236 (Ala. 1982); *State* v. *Stein*, 806 P.2d 346 (Alaska Ct. App. 1991); *State ex rel. Hanson* v. *Superior Court In & For Maricopa Cty.*, 410 P.2d 502 (Ariz. 1966); *State* v. *Moser*, 111 P.3d 54 (Haw. Ct. App. 2005); *People* v. *Meyerowitz*, 355 N.E.2d 1 (Ill. 1975); *People* v. *Nance*, 542 N.W.2d 358 (Mich. 1995); *Wood* v. *State*, 999 N.E.2d 1054 (Ind. Ct. App. 2013); *Toth* v. *State*,

901 A.2d 820 (Md. 2006); *State* v. *Wilbur*, 450 S.W.2d 458 (Mo. Ct. App. 1970); *State* v. *Gallagher*, 955 P.2d 1371 (Mont. 1998); *Scott* v. *Jones*, 84 N.W. 479 (N.D. 1900); *Berea* v. *Moorer*, 55 N.E.3d 1186 (Ohio 2016); *State* v. *Piekkola*, 241 N.W.2d 563 (S.D. 1976) (overruled on other grounds by *Matter of Estate of Erdmann*, 447 N.W.2d 356 (S.D. 1989)).[3]

Federal courts apply the same rule. *United States* v. *Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (holding that "[j]ust as the imposition of a fine is an incident of a criminal conviction, so is the direction for repayment an incident to the vacating and setting aside of the conviction"); *Telink, Inc.* v. *United States*, 24 F.3d 42, 47 (9th Cir. 1994) (stating that if the defendants "prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action").

Another 13 States have codified this principle by statute. For example, South Carolina law provides: "When the judgment is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment." S.C. Code Ann. § 18-1-140. See also Ark. Code Ann. § 16-96-509; Cal. Penal Code § 1262; Del. Code tit. 11 § 4103(a); Miss. Code § 99-19-73(12); N.J. Stat. Ann. § 2A:166-13, as interpreted by *State* v. *Perwin*, 342 A.2d 178, 180 (1975); N.Y. Penal Law § 60.35(4); Me.

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[3] Remarkably, Colorado had adhered to this principle prior to the decision below. In 1961, the Colorado Supreme Court held—upon invalidating a criminal conviction—that "pending such further proceedings the parties be placed in status quo by refund to the defendant of the sums paid as fine and costs." *Toland* v. *Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961); accord *People* v. *Noel*, 134 P.3d 484 (Colo. App. 2005).

Rev. Stat. tit. 17-A § 1303-A; Pa. R.A.P. 2591, as interpreted by *Com.* v. *McKee*, 38 A.3d 879 (2012); 12 R.I. Gen. Laws Ann. § 12-22-14; Tex. Code Crim. Proc. art. 103.008; Utah R. Crim. P. 28; Wash. R. App. P. 12.8; Wash. Rev. Code Ann. § 10.01.160; Wyo. Stat. Ann. § 7-1-103.

Others have taken a different route, choosing instead to minimize the payment of exactions based on subsequently-invalidated convictions by staying fines, fees, and costs when an appeal has been filed. See, *e.g.*, Ky. RCr 12.76; Mass. R. Crim. P. 31; Md. Code Ann., Crim. Proc. § 11-613; Mont. Code Ann. § 46-20-204; Mont. Code Ann. § 46-20-707; Nev. Rev. Stat. Ann. § 177.115; S.D. Codified Laws § 23A-33-4; W. Va. Code Ann. § 62-7-1.

And many States have extended this principle beyond the financial exactions attendant to a criminal conviction. Convictions today can produce myriad collateral consequences, ranging from ineligibility for public housing to inability to purchase a firearm. See American Bar Association, National Inventory of Collateral Consequences of Conviction, perma.cc/-APU3-JDWV. Many States provide for automatic, or virtually automatic, reversal of these other collateral consequences upon the invalidation of a conviction that was the basis for imposing those consequences. For instance, States have enacted statutes providing for voter re-enfranchisement,[4] the expunction or sealing of

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[4] Almost all States provide for automatic voter re-enfranchisement on release from prison or discharge of sentence. See Ark. Const. art. III, § 2; Colo. Const. art. VII, § 10; Del. Const. art. V, § 2; Ga. Const. art. II, § 1, para. III; Idaho Const. art. VI, § 3; Kan. Const. art. V, § 2; Tex. Const. art. VI, § 1; Alaska Stat. Ann. § 12.55.185; Conn. Gen. Stat. Ann. § 9-46a; Haw. Rev. Stat. Ann.

criminal records,[5] and relief from sex offender registration requirements.[6]

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§ 831-2; Ill. Comp. Stat. Ann. 5/5-5-5; Ind. Code Ann. § 3-7-13-5; La. Stat. Ann. § 18:102; 730 Md. Code Ann. Elec. Law § 3-102; Mass. Gen. Laws Ann. ch. 51, § 1; Mich. Comp. Laws Ann. § 168.758b; Minn. Stat. Ann. § 609.165; Mo. Ann. Stat. § 561.026; Mont. Code Ann. § 46-18-801; Nev. Rev. Stat. Ann. § 213.157; N.H. Rev. Stat. Ann. § 607-A:2; N.J. Stat. Ann. § 19:4-1; N.M. Stat. Ann. § 31-13-1; N.Y. Elec. Law § 5-106; N.D. Cent. Code Ann. § 12.1-33-03; Ohio Rev. Code Ann. § 2961.01; Okla. Stat. Ann. tit. 26, § 4-101; Or. Rev. Stat. Ann. § 137.281; S.C. Code Ann. § 7-5-120; 17 R.I. Gen. Laws Ann. § 17-9.2-3; S.D. Codified Laws § 12-4-18; Tenn. Code Ann. § 2-2-139 (other provisions in the act held unconstitutional); Utah Code Ann. § 20A-2-101.5; Va. Code Ann. § 53.1-231.2; Wis. Stat. Ann. § 304.078.

[5] At least twelve States have enacted statutes providing for the expunction or sealing of criminal records. See Fla. Stat. Ann. § 943.059 (West 2016); Ala. Admin. Code r. 660-5-34-.09 (2016); Admin. Code r. 11.10.02.021; Ill. Admin. Code tit. 20, § 1285.70 ; Iowa Admin. Code r. 661-83.5(692A); Kan. Admin. Regs. 30-46-17; Miss. Admin. Code 31-2:6.1; 14B N.C. Admin. Code 18B.0501; N.D. Admin. Code 10-13-11-01; 234 Pa. Code § 320; S.C. Code Ann. Regs. 73-26 ; Tenn. Comp. R. & Regs. 1395-01-01-.07; Wash. Admin. Code 446-16-025. For a more exhaustive list, see Thomson Reuters, *Expungement of Criminal Records*, 0030 Surveys 20 (October 2015).

[6] Sex offenders can obtain relief from registration requirements in at least thirteen states when a conviction is reversed. See Colo. Rev. Stat. Ann. § 16-22-113; D.C. Code Ann. § 22-4001; Kan. Stat. Ann. § 22-4902; Me. Rev. Stat. tit. 34-A, § 11225-A; Miss. Code Ann. § 45-33-47 ; Mo. Ann. Stat. § 589.400(3); Mont. Code Ann. § 46-23-510; N.Y. Correct. Law § 168-f; N.C. Gen. Stat. Ann. § 14-208.6C; Or. Rev. Stat. Ann. § 163A.015; S.C. Code Ann. § 23-3-430; Ark. Admin. Code 004.00.3-39; 19 Va. Admin. Code 30-170-30. In at least one State, Connecticut, individuals with pending appeals are not considered to have a conviction for the purposes of sex offender registration requirements, mitigating the need for termination. See Conn. Gen. Stat. Ann. § 54-250.

The States' broad commitment to restoring a defendant to the status quo ante upon invalidation of a conviction reaffirms the longstanding norm that "when judgment, pronounced upon conviction, is falsified or reversed, * * * the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates * * *." 4 William Blackstone, *Commentaries* *386.

4. Colorado's deviation from these longstanding principles violates due process.

The foregoing history is dispositive of the due process inquiry. In *Medina*, the Court examined the "historical treatment of the burden of proof in competency proceedings." 505 U.S. at 446. Citing Blackstone and Hale, the Court concluded that "[t]he rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." *Ibid.*

In *Patterson*, by contrast, the Court found that New York could require a defendant to carry the burden of proof of severe emotional disturbance in a murder trial because "at common law" that burden historically "rested on the defendant." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). And in *Leland*, this Court held that the burden of proof as to an insanity plea could be placed upon the defendant. History was dispositive: "In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity." *Leland* v. *Oregon*, 343 U.S. 790, 799 (1952).

History is equally dispositive in this case. The principle that financial exactions attendant to a criminal conviction must be restored to the defendant when the conviction is invalidated has roots at least as deep as those protecting the insane against trial. Blackstone

and Hale recognized this principle, and it dates back to more than three hundred years before Blackstone.

Similarly ancient is the idea that defendants in such situations need not prove their innocence; reversal itself is all that was required for restoration to the status quo ante. The burden of proof was never an issue, because there was nothing to prove (except the reversal of the judgment itself). At the time the States ratified the Fourteenth Amendment, the States and the federal government applied this principle and imposed minimal, if any, processes upon defendants seeking restoration.

Colorado's Exoneration Act thus "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Medina*, 505 U.S. at 445)—the right to automatic or near-automatic restoration of a financial exaction upon reversal of the conviction supporting the exaction.

B. Under the decision below, criminal defendants whose convictions are reversed would be in a worse position than taxpayers subjected to an unlawful tax.

1. This Court has long recognized that taxpayers have a due process right to a "clear and certain" refund of improperly collected taxes. "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930). When a taxpayer pursues a preserved claim, "due process requires a 'clear and certain' remedy for obtaining a refund." *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe R. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912)); see also *McKesson*

Corp. v. *Division of Alcoholic Beverages*, 496 U.S. 18, 22 (1990).

The Colorado Exoneration Act puts defendants subjected to an invalid criminal conviction in a worse position than taxpayers subjected to an unlawful tax. This is further evidence of the violation of due process."[I]f a [state] obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Ward* v. *Bd. of Cty. Comm'rs*, 253 U.S. 17, 24 (1920) (quoting *Marsh* v. *Fulton Cty.*, 10 Wall. 676, 684 (1870)).

Colorado asserts that "a tax that is prohibited by the Constitution is very different from a restitution order under a conviction—after the full protections of trial—that is reversed on appeal." Br. in Opp. 22. It argues that "[c]onvictions may be reversed for any number of reasons, ranging from actual innocence, to constitutional error, to lawyer or jury misconduct, to technical legal errors at trial." *Ibid.* But the same is true of taxes—there are a variety of grounds for invalidating them.

The critical facts are the same: If the basis for imposing the tax (the statute) is subsequently invalidated, the tax collected on its authority must be returned. When the basis for exacting funds was a conviction, the subsequent invalidation of the conviction should have at least the same effect. After all, due process does not permit the collection of a criminal fine on the basis that the defendant is unable to prove his *innocence*; on the contrary, it is for the state to prove *guilt*. Why shouldn't the same standard apply in reverse following appellate reversal?

Moreover, there is no rational justification for requiring the return of an invalid tax exaction, but permitting retention of an exaction imposed on the

basis of an invalid criminal judgment. The Constitution provides *greater* procedural protections to criminal defendants, not lesser ones. Whereas "[i]n the administration of criminal justice, the Due Process Clause [requires] that the state prove the guilt of an accused beyond a reasonable doubt," the "plaintiff's burden of proof [in civil suits] is a mere preponderance of the evidence." *Addington* v. *Texas*, 441 U.S. 418, 423–24 (1979). In sum, Colorado's attempts to distinguish taxes from conviction penalties are baseless.

2. The same result is compelled by the *Matthews* balancing test, which requires

> consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 334–35 (1976).

Petitioners' brief explains why *Mathews* bars the additional procedural burdens imposed by the Colorado statute. Pet. Br. 22-23.

It is similarly clear that, under *Mathews*, criminal defendants whose convictions have been invalidated have a strong claim that substantive procedural hurdles cannot be imposed on the return of monetary exactions awarded on the basis of invalidated convictions.

First, criminal defendants have a stronger private interest than taxpayers because of the stigma associated with any penalty or payment triggered by a criminal conviction.

Second, there is a clear risk of erroneous deprivation: The State is permitted to retain funds when the basis for exacting them—the imposition of a conviction—no longer exists. Without a valid conviction, there is no statutory basis for an exaction at all. On the other hand, tax refund cases often involve complicated factual disputes that pose far less risk of erroneous deprivation.

Third, the government has a much greater interest in the collection of taxes than in the collection of criminal fines, which constitute a *de minimis* part of the state budget. A jury's guilty verdict alone does not create any government interest in collecting criminal fines, unless that verdict was lawfully obtained. States like Colorado tacitly admit this by declining to impose criminal fines when a trial judge rejects a jury's guilty verdict as contrary to the evidence. Further weakening any claimed state interest in monetary penalties, Colorado only imposes the additional procedures set forth in the Colorado Exoneration Act when the defendant is sentenced to a term of incarceration. Tax law cases, conversely, have acknowledged the weighty interests of the government in collecting taxes. See, *e.g.*, *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 103, 115-117 (1981) (recognizing that federal courts cannot enjoin state tax collection if a "plain, speedy, and efficient" remedy is available in state court, citing 28 U.S.C. § 1341); see also *Am. Trucking Associations, Inc.* v. *Smith*, 496 U.S. 167 (1990).

All three elements of the *Mathews* balancing test point toward the same conclusion: Petitioners are due

more favorable, not less favorable, process than are taxpayers. But Colorado's statute instead subjects them to more onerous procedural requirements in attempting to recover exactions based on subsequently invalidated convictions. That makes no sense.

C. The Colorado law's imposition of different procedural burdens on similarly-situated defendants confirms its unconstitutionality.

The Colorado statute's unconstitutionality is further confirmed by its differential treatment of similarly situated criminal defendants. Differential treatment not only undermines any argument by Colorado that substantial state interests justify the procedural burdens imposed by the State's law, but it also provides a strong basis for concluding that the Act violates the Equal Protection Clause.

First, this Court in *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966), held unconstitutional a state law that differentiated between defendants based on whether or not they had been subjected to "a term of incarceration." Colorado's Exoneration Act appears to draw precisely the same distinction.

Rinaldi involved a New Jersey law that required convicted defendants to pay the cost of unsuccessful appeals—but only if they were in prison. Defendants who were not in prison—*i.e.* those with suspended sentences or whose sentences were limited to monetary penalties—were not subject to the payment obligation. The Court held that distinction unconstitutional. "[T]he law fastens the duty of repayment only upon a single class of unsuccessful appellants—those who are confined in institutions. We find that the discriminatory classification imposed by this law violates the

requirements of the Equal Protection Clause." *Id.* at 308 (footnote omitted).

Like the provision at issue in *Rinaldi*, the Act applies only to defendants who were "sentenced to a term of incarceration * * * and [have] served all or part of such sentence." Colo. Rev. Stat. § 13-65-102(1)(a). The decision below thus suggests that defendants not subject to incarceration would simply be out of luck, without recourse to any "procedure for seeking a refund." Pet. App. 19a.

This distinction violates the holding in *Rinaldi*. Criminal defendants cannot be treated differently with respect to financial exactions based on whether one received a sentence of incarceration and the other did not. *Rinaldi*, 384 U.S. at 308.

Second, the Colorado statute distinguishes among defendants depending on the stage of proceedings at which a jury verdict of guilt is set aside. Under Rule 29(c) of the Colorado Rules of Criminal Procedure, a judge can issue a judgment of acquittal after a jury verdict of guilt if the evidence is insufficient to sustain a conviction. In that instance, the defendant would not pay any criminal penalties.

But consider another defendant whose conviction is vacated on appeal based on insufficient evidence—the very same standard. That person would have to prove actual innocence in order to obtain a refund of the monetary exactions.

In both cases the State failed to provide sufficient evidence to meet its burden of proof, but in only one case did the defendant have to prove her innocence to keep her money. That distinction is unjustifiable and unconstitutional.

CONCLUSION

The judgments of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 17 2016
OFFICE OF THE CLERK

No. 15-1256

In the
Supreme Court of the United States

SHANNON NELSON,

Petitioner,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

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QUESTION PRESENTED

Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence to get their money back.

The Question Presented is whether this requirement is consistent with due process.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely respected as an experienced nonprofit legal foundation.[1] Among other matters affecting the public interest, PLF defends the constitutional principles of due process of law and property rights. PLF attorneys have participated as lead counsel or counsel for amici in numerous cases before this Court involving property rights and due process. *See, e.g., U.S. Army Corps of Engineers v. Hawkes*, __ U.S. __, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367 (2012).

PLF urges the Court to hold that exonerees are entitled to an automatic refund of payments paid pursuant to a conviction. After that conviction has been invalidated, Colorado no longer has any right to hold onto exonerees' money. Refusing to refund the money absent a showing of innocence inflicts an onerous burden of proof that violates basic notions of fairness rooted in due process of law.

INTRODUCTION AND SUMMARY OF ARGUMENT

For exonerated individuals in Colorado to get a refund of fees and fines exacted for a wrongful conviction, they must prove by clear and convincing

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. And pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

evidence that they did not commit the crime for which they were exonerated. *See* CRS §§ 13-65-101(1)(a), 102. Colorado reversed Shannon Nelson's conviction after determining on appeal that the trial court had introduced improper expert testimony. *People v. Nelson*, 362 P.3d 1070, 1071 (Colo. 2015). On retrial, a jury acquitted her. *Id.* Nelson had paid $702.10 for restitution, victim and law enforcement funds, and other administrative fees. *Id.* These payments were all predicated on her conviction. *See, e.g.*, CRS § 24-4.1-119 (costs "levied on each criminal action resulting in conviction"). She moved for a refund of this money following her acquittal. *Nelson*, 362 P.3d at 1071. But the state insists that—under Colorado's Exoneration Act—she must file a separate civil action and prove her innocence before it will return her money. *See Nelson v. Colorado*, No. 15-1256, Brief in Opposition 22 (Aug. 9, 2016).

Without a valid conviction, the state's taking of Nelson's money has no basis in law. It is a deprivation of property for no reason whatsoever. The Exoneration Act nonetheless lays claim to her money unless she proves her own innocence. This arbitrary deprivation violates due process. Just as a state must release exonerees from detention, the state must refund exonerees the money paid because of a wrongful conviction.

Even if Colorado can require some procedure to obtain a refund, due process requires a fair and reasonable one. Having to prove a negative—that one did not commit a crime—is neither fair nor reasonable, and in some cases, impossible. This requirement is therefore unconstitutional under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I

COLORADO MUST RETURN MONEY PAYMENTS CONDITIONED ON A WRONGFUL CONVICTION

An exaction based on a wrongful conviction has lost its sole legal predicate. Procedural barriers that prevent an automatic refund following exoneration therefore deprive the exoneree of property without due process of law.

A. Upon Exoneration, a State's Refusal to Refund Conviction-Related Expenses Constitutes an Arbitrary Penalty

An exaction that does not alleviate a harm, punish wrongdoing, or serve any other legitimate public purpose is excessive as a matter of law. An excessive exaction is "plainly arbitrary and oppressive as to be nothing short of a taking of . . . property without due process of law." *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915). Thus, due process sets limits "beyond which penalties may not go." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)). Proportionality—an "ancient and fundamental principle of justice"—is one of these limits. *Id.* at 478 (Scalia, J., dissenting). A penalty or exaction must be proportional to the wrong to be punished or the harm to be alleviated. *See id.*; *see also Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (in the land-use context, an exaction must be proportional "both in nature and extent to the impact of the proposed

development"). And any exaction that serves no public purpose at all is excessive as a matter of law. *See Bennis v. Michigan*, 516 U.S. 442, 471 (1996) (Stevens, J., dissenting) (For the blameless individual, "even a modest penalty is out of all proportion to [that individual's] blameworthiness."); *see also Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference."). Where there are no grounds for the exaction, the proportional penalty is zero and is necessarily excessive and arbitrary.

Here, Nelson's payments to the state are premised on alleviating the harms associated with her alleged crime. Ms. Nelson's payments went to victim restitution, a general victim compensation fund, a victims and witnesses assistance and law enforcement fund, and various court costs. *Nelson*, 362 P.3d at 1071. All of these payments were premised on her conviction. *See* CRS § 13-65-103(2)(e)(V). Once the state determined she was wrongfully convicted, any public purpose animating the exaction vanished. Colorado had a duty at that point to return her money.

This situation is different from asset forfeiture. Unlike Colorado's Exoneration Act, the use of asset forfeiture is at least attached to "the conviction of the offender." *The Palmyra*, 25 U.S. 1, 9 (1827). Although such forfeitures can afflict innocent owners, this Court holds they still serve a genuine public purpose when connected to a conviction. In *Bennis v. Michigan*, this Court upheld a law that did not offer an innocent owner's defense to a joint owner of a forfeited vehicle where the other owner had committed the crime at issue. 516 U.S. at 446. The Court reasoned that such

seizures served legitimate government interests even as applied to the innocent joint owner. *Id.* at 452. Forfeiture encouraged vigilance in preventing misuse of property by others, and it offered a surer means of addressing potential collusion between the property owner and the criminal defendant. *Id.*

No such rationale can justify the exaction here because no valid conviction exists with regard to Ms. Nelson or anyone connected with her. By retaining exonerees' money without a showing of innocence, the state imposes an arbitrary and excessive penalty that violates due process.

B. Money Exacted on the Premise of a Wrongful Conviction Violates "Due Process of Law" Because No "Law" Supports the Exaction

Ms. Nelson's exoneration vacates the sole legal basis for the fees and fines she was required to pay. This deprives her of due process of law because no law supports the state's interest in her money.

Due process demands that a deprivation of property may occur only in accordance with "law." An arbitrary government action with no rational principle is not a law. Timothy Sandefur, *The Conscience of the Constitution* 79-84 (2014). As constitutional historian and scholar Edward Corwin put it, a government act "may at times part company with 'true law' and thereby lose its title to be considered a law at all." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 11 (1955). Justice Chase famously espoused this view in *Calder v. Bull*: "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social

compact; cannot be considered a rightful exercise of legislative authority." 3 U.S. (3 Dall.) 386, 388 (1798). This Court has since affirmed this understanding of "due process of law" as "something more than mere will exerted as an act of power." *Hurtado v. California*, 110 U.S. 516, 535-36 (1884). A deprivation of rights may only occur through an act authorized by a legitimate law, not an act of arbitrary will.

The founders shared this understanding of due process of law. The people who drafted and ratified the Fifth and Fourteenth Amendments were steeped in a historical tradition that granted substantive meaning to "law." This tradition stemmed from influential British interpretations of the Magna Carta's "law of the land" clause. *See* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283, 287 (2012) [hereinafter *In Defense*]. Lord Edward Coke's treatise, *The Institutes*—which deeply influenced the founding generation—equated this "law of the land" language with "due process of law." *Id.* at 288; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process*, 58 Emory L.J. 585, 607, 662 (2009). Coke believed that "law of the land" or "due process of law" meant that the sovereign could only deprive someone of their rights through a law rooted in rationality. Sandefur, *In Defense*, *supra*, at 288. He said the Magna Carta forbade an irrational government act because it lacked the foundation of genuine law. His contemporary, Francis Bacon, made a similar observation: "In Civil Society, either law or force prevails. But there is a kind of force which pretends to law, and a kind of law which savours of force rather than equity." Francis Bacon, Aphorism 1, *reprinted in*

The Philosophical Works of Francis Bacon 613 (John M. Robertson ed. 1905). The founding generation—intimately familiar with "force which pretends to law"—embraced this view. Gedicks, *supra*, at 611-12, 618.

A government action that lacks a coherent explanatory principle is arbitrary and violates Coke's rule of rationality. Sandefur, *In Defense*, *supra*, at 292, 302, 328-29. If a government act does not serve a legitimate end—including fundamental notions of justice—that act violates due process of law. As James Madison wrote, in his essay on property: "[T]hat alone is a just government which impartially secures to every man whatever is his own." James Madison, *Property*, *reprinted in James Madison: Writings* 515 (Jack N. Rakove, ed. 1999). And the corollary: "[T]hat is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." *Id.*

An exaction that lacks any legally valid basis is just such an arbitrary seizure. Once the original predicate for the deprivation is no longer valid, retaining the property violates due process. Absent a conviction, only arbitrary whim supports the state's refusal to automatically refund Ms. Nelson's money—"an assertion of authority that rests on no basis other than the fact that the authority has asserted it." Sandefur, *In Defense*, *supra*, at 292. In this case, no explanatory principle exists to satisfy Coke's rule of rationality. Nor does the procedure for obtaining a refund make this less of an arbitrary deprivation. Plunder is not absolved of its unlawful character by offering back the stolen property if the owner can prove

they deserve it. The refusal to return property rightfully belonging to the exoneree is merely "the kind of force which pretends to law"—an act of mere political will with no root in the public good.

II

COLORADO'S PURPORTED REFUND PROCEDURE CANNOT SAVE THE STATUTE

Even if the state's refusal to refund exonerees' money is not a substantive violation of due process, Colorado's onerous procedure for exonerees to get a refund still fails procedural due process.

The classic formulation of the procedural due process test comes from *Mathews v. Eldridge*, 424 U.S. 319 (1976). That test looks to three factors:

1. The private interests at stake;

2. The government interests involved; and

3. The fairness and reliability of the current procedure and the likely benefits of improved procedural safeguards. *Id.* at 335.

The *Mathews* analysis involves a "judicious balancing" of these factors. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

A. *Mathews v. Eldridge* Applies to This Case Because Nelson's Due Process Claim Does Not Challenge a Conviction or Defend Against an Indictment

The proper test for procedural due process depends on whether the deprivation at issue occurs in

the context of a criminal proceeding. While *Mathews* represents the general approach in the civil context, a test laid out by *Medina v. California*, 505 U.S. 437 (1992), applies to criminal proceedings. Here, however, *Mathews* applies because this case does not involve a challenge to an underlying conviction or criminal charge.

Medina imposes a tougher test for the due process claimant to satisfy. In *Medina*, a criminal defendant argued that the government violated his due process rights by requiring him to show by a preponderance of the evidence that he was mentally incompetent to stand trial. 505 U.S. at 442. The Court held that *Mathews* does not apply to criminal cases because the Constitution already provides enumerated guarantees regarding criminal procedure. *Id.* at 443. Because of these explicit protections, expanding procedural rights "under the open-ended rubric of the Due Process Clause invited undue interference with both considered legislative judgments and the careful balance the Constitution strikes between liberty and order." *Id.* Due process must allow space for state criminal procedure to operate because "preventing and dealing with crime is much more the business of the States than it is of the federal government." *Id.* at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). The Court therefore relied on a test that demanded more of a due process claimant in the criminal law context than *Mathews*. The *Medina* test requires a showing that the challenged procedure violates a tenet of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* This Court's reluctance to recognize fundamental but unenumerated rights in the

substantive due process setting speaks to the difficulty of satisfying *Medina*. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (rejecting the right to die as a right under substantive due process); *see also Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.").

The *Medina* test, however, does not apply to matters ancillary to a criminal proceeding. For instance, in *Krimstock v. Kelly*, the Second Circuit declined to apply *Medina* to a challenge to a pretrial seizure of a vehicle for evidence in building a criminal case. 464 F.3d 246, 254 (2d Cir. 2006). Since the due process challenge did not bear on an underlying conviction or indictment, the Court applied *Mathews*. *Id.*; *see also Harvey v. Horan*, 285 F.3d 298, 316 n.6 (4th Cir. 2002) (Wilkinson, J., concurring in denial of request for rehearing en banc) (reasoning that *Medina* should not apply to a post-trial due process challenge regarding access to evidence because the claim was not a challenge to an underlying conviction). Supreme Court practice supports this approach. In *United States v. James Daniel Good Real Property*, this Court addressed—in the context of a drug-related offense—whether post-trial forfeiture of a house without notice or hearing violated due process. 510 U.S. 43, 47 (1993). This Court applied *Mathews*, not *Medina*. *See id.* at 53. This approach makes sense because pre-trial and post-trial proceedings regarding property do not enjoy the many enumerated protections for criminal proceedings found in the Bill of Rights, such as the right against self-incrimination. Moreover, *Medina*'s stricter test applied only to the

work of "preventing and dealing with crime." *Medina*, 505 U.S. at 445. Due process disputes over property that do not seek to overturn a conviction or dispute an indictment do not relate to that goal.

This dispute resembles *James Daniel Good Real Property* and *Krimstock*: a due process challenge that does not bear on an underlying conviction. Like in *Krimstock*, no conviction exists here. Indeed, the case for *Mathews* is stronger here, since in *Krimstock* the seizure occurred in an ongoing criminal investigation aimed at an ultimate conviction. Here, the deprivation does not even flirt with criminal charges or conviction. Therefore, the *Mathews* due process test applies.

B. An Interest in Traditional Property Such as Money Deserves Heightened Protection

The first *Mathews* factor calls upon courts to weigh the private interest at stake. An interest in traditional property rights long-recognized at common law—including money--deserves heightened due process protections as exemplified by this Court's treatment of government entitlements and other property interests.

This Court's landmark procedural due process jurisprudence was built in the context of government entitlements. *Goldberg v. Kelly* involved the termination of benefits under the federal program Aid to Families with Dependent Children. 397 U.S. 254, 255-56 (1970). *Board of Regents v. Roth* involved tenure rights at a public college. 408 U.S. 564, 566 (1972). *Mathews v. Eldridge* itself arose from a dispute over social security disability benefits. 424 U.S. at 323. This case presents an opportunity for the Court to

affirm the greater process due where the property interest inheres in common-law rights rather than a government entitlement.

Unlike classic property interests such as income, real estate, or chattels, a government entitlement exists at the behest of the legislature. Courts have recognized therefore that government enjoys more control over the procedures involved in taking away the entitlements it creates. The grant of government entitlements is often "inextricably intertwined with the limitations on the procedures which are employed" in protecting that entitlement. *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974). The substantive property right granted by the state is "itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155. Thus, the due process claimant in cases involving government entitlements must often "take the bitter with the sweet." *Id.* at 153-54. To some extent, what the state gives, the state may take away.

Government has less leeway, however, in controlling traditional property interests, like land and money. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the state argued that a purchaser of property should not have a valid regulatory takings claim if they bought the property with notice of the pre-existing regulation. *Id.* at 611. It based this conclusion on the notion that "[p]roperty rights are created by the State." *Id.* at 626. The Court refused to countenance this attempt to put a "Hobbesian stick into the Lockean bundle" of traditional property. *Id.* at 627. That Hobbesian stick is the right to redefine the nature of traditional property in a manner that restricts constitutional rights.

The Ninth Circuit drew a similar conclusion in *Schneider v. California Department of Corrections*. 151 F.3d 1194 (9th 1998). There, the court addressed whether the state could take interest earned on inmates' accounts. *Id.* at 1195. The lower court had found no property interest granted by statute. The Ninth Circuit held that traditional property in one's earned money exists independently of legislative decree. *Id.* at 1199 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)). The court then made a crucial distinction between entitlements and traditional property: "States may, under certain circumstances, confer 'new property' status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional 'old property' interests found within the core." *Id.* at 1200-01. The state could not control the inmates' interest income—a type of "old" property—to the same extent as government entitlements.

This Court has employed a stricter procedural due process approach to cases involving the "Lockean bundle" of traditional property interests. For example, in *Fuentes v. Shevin*, the court examined the constitutionality of a replevin statute that allowed private parties to have property seized without a pre-deprivation hearing and only a minimal showing of an ownership interest. 407 U.S. 67, 69-70 (1972). The plaintiff in *Fuentes* had been deprived of kitchen appliances and furniture through the replevin procedure. *Id.* The Court demanded a strict showing from the state that the deprivation was "directly necessary to secure an important governmental or general public interest." *Id.* at 91.

That demanding language asks more of the government than what seems typical in the government entitlement cases. Indeed, the *Mathews* Court said—in the context of government entitlements—that the financial and administrative burdens imposed on the government were weighty interests that could suffice to override a claimant's due process interest. *Mathews*, 424 U.S. at 348. The Court considered such costs significant even though the government could not quantify them: "We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate cost in terms of money and administrative burden would not be insubstantial." *Id.* at 347. This forgiving approach to evaluating the government interest in entitlement cases pales compared to the strict requirement in *Fuentes* that the government show direct necessity to secure an important government interest. *Fuentes*, 407 U.S. at 91. Where government deprives someone of an interest in traditional property, like money, the government must make a stronger showing of its own interest as a counterbalance.

Exonerees deserve the robust protections afforded traditional property under *Fuentes*. The weight of Ms. Nelson's private interest in her own money demands a strong showing that the onerous procedural burden placed on exonerees is directly necessary to further an important government purpose. The government cannot make such a showing here.

C. Under *Mathews*, the Government Has No Legitimate Interest at Stake in Retaining the Money Exacted from Nelson as a Consequence of Her Wrongful Conviction

The second *Mathews* factor—the government interest involved—does not favor the state in this case. The government cannot show that requiring exonerees to prove their own innocence to retrieve their money is directly necessary to further an important government purpose, as required by *Fuentes*. The Supreme Court of Colorado upheld the Exoneration Act's procedure on the grounds that the legislature enjoyed primacy in controlling appropriations and the general budget. *Nelson*, 362 P.3d at 1076-78. The court worried that an equitable power in courts to draw money from the general fund and refund exonerees would impinge on core separation of powers principles. *Id.* But that separation of powers concern does not meet the *Fuentes* standard of government interest required to counterbalance the strong private interest in traditional property.

Separation of powers does not exist to protect government prerogatives. Government structure "exists not to look after the interests of the respective branches, but to protect individual liberty." *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring). As James Madison observed, dividing the powers of government is essential to protect freedom. Federalist No. 51. The framers separated the departments of government and gave them power to protect against encroachments by one another in order to prevent the abuse of power. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

Colorado has no legitimate interest in protecting the legislature's domain at the expense of individual liberty. The specific guarantee of an enumerated constitutional right serves as the boundary of the broader structural protection of liberty. Colorado cannot exalt the legislature's prerogative above liberty's precepts.

Nor will Colorado face any daunting financial or administrative burdens by granting automatic refunds. In the typical due process case, plaintiffs seek an increase in procedural bells and whistles—hearings, notice, oral testimony, cross-examination, etc. These things can be costly. Here, though, exonerees want less procedure. They simply want their money back. The removal of red tape will not tax Colorado's financial or administrative resources. Nor is Colorado likely to release such a deluge of exonerees needing refunds as to have a material impact on the public fisc. The respective balance of interests in this case tilt sharply toward the exonerees who have already suffered enough at the hands of the state.

D. A Requirement That Exonerees Prove Their Innocence to Get Back Their Money Defies Basic Notions of Fair Play

Fairness is the watchword of due process. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). The third *Mathews* factor thus considers "the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards." *Mathews*, 424 U.S. at 321. The Exoneration Act's demand that exonerees prove their own innocence by clear and convincing evidence to get

back their own money is neither fair nor reliable. Exonerees deserve a presumption of innocence when it comes to protecting both their liberty and their property.

This Court is a steady champion of the presumption of innocence. That presumption, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). This "axiomatic and elementary" right ought to apply to both liberty and property deprivations. *Coffin v. United States*, 156 U.S. 432, 453 (1895). After all, the due process requirement applies equally to "life, liberty, or property." This Court has said these rights are inextricably intertwined: "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). If the presumption of innocence is indispensable to protect life and liberty, then property deserves nothing less.

The Exoneration Act's abandonment of this basic presumption undermines both the fairness and reliability at the heart of due process. First, it misplaces the burden of proof. The onus of proving that a taking of property is justified should rest with the one taking it. Moreover, innocent exonerees may be unable to prove their innocence by clear and convincing evidence. Even if no evidence exists that they committed an offense, a mere inability to present a high quantum of evidence could present an insuperable barrier to retrieving their property. And for many exonerees, the cost of pursuing a refund

through a civil action will exceed the refund's value. This onerous procedure does not comport with the notions of fair play central to due process.

CONCLUSION

Due process "reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes*, 407 U.S. at 81. Colorado has no legal predicate for keeping exonerees' money, paid pursuant to an invalid conviction. Nevertheless, the state lays claim to their property unless they can prove their own innocence. This arbitrary demand serves no public interest. It imposes a profound burden on exonerees who have already suffered unjustly, and it does so where their interests far exceed any interests of the state. This Court should reverse.

DATED: November, 2016.

Respectfully submitted,

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